(23,615)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 139.

GLENN KNAPP, PLAINTIFF IN ERROR,

vs.

ALEXANDER-EDGER LUMBER COMPANY.

IN ERROR TO THE CIRCUIT COURT OF BAYFIELD COUNTY, STATE OF WISCONSIN.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 24, 1914.

1 & 2 STATE OF WISCONSIN:

Circuit Court, Bayfield County.

GLENN KNAPP, Plaintiff in Error,
vs.
ALEXANDER-EDGER LUMBER COMPANY, a Corporation, Defendant in Error.

Return to Writ.

UNITED STATES OF AMERICA,
Circuit Court Bayfield County,
State of Wisconsin, ss:

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete records and proceedings in the within entitled case of all things concerning the same.

In witness whereof I have hereunto set my hand and affixed the seal of the Circuit Court of Bayfield County, State of Wisconsin, at the City of Washburn in the State of Wisconsin, this 19th day of March, 1913.

[Seal Circuit Court Bayfield Co., Wisconsin.]

F. A. BELL,
Clerk Circuit Court Bayfield County, Wisconsin.

3 United States Supreme Court.

Filed Office of the Clerk of Circuit Court Bayfield Co., Wis., Mar. 15, 1913. F. A. Bell.

GLENN KNAPP, Plaintiff in Error,
vs.
ALEXANDER-EDGER LUMBER COMPANY, a Corporation, Defendant in Error.

UNITED STATES OF AMERICA,
State of Wisconsin, ss:

The President of the United States of America to the Honorable the Clerk of the Circuit Court for Bayfield County, Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea rendered by the Circuit Court of Bayfield County, State of Wisconsin, in compliance with the mandate of a judgment of the Supreme Court of the State of Wisconsin, being the

highest court of law or equity of said State in which a decision could be had in said suit between Glenn Knapp and Alexander-Edger Lumber Company, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened to the great damage of the said Glenn Knapp, as by his complaint appears. We being willing that error, if any hath been should be duly corrected, and full and speedy justice done to the
4 parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 10th day of April next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 10th day of March, 1913.

[Seal U. S. District Court, Western Dist. of Wisconsin, Madison.]

T. W. OAKLEY,
Clerk of the District Court of the U. S. for the West. Dist. of Wisconsin,
By FRED W. FRENCH, *Deputy.*

Allowed by
JOHN B. WINSLOW,
Chief Justice of the Supreme Court of Wisconsin:

5 [Endorsed:] Original. No. —. State of Wisconsin, — County, Supreme Court. Glenn Knapp, Plaintiff, vs. Alexander-Edger Lumber Co., a corporation, Defendant. Writ of Error. Due personal service of the within — is hereby admitted this — day of ——, 191–, —— ——, Attorney for —. Grace, Hudnall & Fridley, Attorneys for pl'tf., Berkshire Bldg., Superior, Wis.

6 STATE OF WISCONSIN:

Supreme Court.

GLENN KNAPP, Plaintiff in Error,
vs.
ALEXANDER-EDGER LUMBER COMPANY, a Corporation, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Alexander-Edger Lumber Company:

You are hereby cited and admonished to be and appear in and before the Supreme Court of the United States in Washington, D. C., within thirty (30) days from the date hereof pursuant to a writ of error filed in the office of the Clerk of the Circuit Court of Bayfield County, Wisconsin, wherein Glenn Knapp is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Jno. B. Winslow, Chief Justice of the Supreme Court of the State of Wisconsin, this 10th day of March, 1913.

JNO. B. WINSLOW,
Chief Justice of the Supreme Court of Wisconsin.

Attest:

CLARENCE KELLOGG,
Clerk of the Supreme Court of Wisconsin.

7 [Endorsed:] Original. No. —. State of Wisconsin, — County, Supreme Court. Glenn Knapp, Plaintiff in error, vs. Alexander-Edger Lumber Co., a corporation, Defendant in error. Citation. Service of the within citation is hereby admitted this 15" day of March, 1913. Alexander-Edger Lumber Co., by Kreutzer, Bird, Rosenberry & Kineski, its Att'ys. Grace, Hudnall & Fridley, Attorneys for pl't'f, Berkshire Bldg., Superior, Wis.

8 STATE OF WISCONSIN:

Supreme Court.

Filed Office of the Clerk of Circuit Court, Bayfield Co., Wis., Mar. 15, 1913. F. A. Bell.

GLENN KNAPP, Plaintiff in Error,
vs.
ALEXANDER-EDGER LUMBER COMPANY, a Corporation, Defendant in Error.

Petition for Writ of Error.

Now comes Glenn Knapp, the plaintiff in error herein, and respectfully shows that on the 11th day of July, 1910, the Circuit Court for Bayfield County, Wisconsin, entered a judgment herein in favor of the plaintiff in error and against the defendant in error for the sum of Seven Hundred Fourteen and 87/100 Dollars. ($714.87) being the highest market value of timber cut by the defendant in error on the homestead of the plaintiff in error, the trespass being a wilful one, together with interest and costs; that on the 14th day of March 1911 the Supreme Court of the State of Wisconsin, entered its final judgment herein reversing the judgment of the Circuit Court for Bayfield County, Wisconsin, with directions to the Circuit Court of Bayfield County, Wisconsin, to dismiss the complaint; that on the 18th day of November, 1911, the Circuit Court for Bayfield County, Wisconsin, pursuant to the judgment of the Supreme Court of the State of Wisconsin, entered its final judgment dismissing the complaint upon the merits and adjudging that the plaintiff in error herein take nothing in said action; that in such judgments and in the proceedings had prior thereto in this case, certain error were committed to the prejudice of the plaintiff in error, all of which will appear more in detail in the assignments of error which is filed with this petition.

Wherefore the plaintiff in error prays that a writ of error be issued in this behalf out of the Supreme Court of the United
9 States, and that he may be allowed to bring up for review before the Supreme Court of the United States the final judgment of the Circuit Court of Bayfield County, Wisconsin, entered pursuant to the final judgment of the Supreme Court of the State of Wisconsin, for correction of the errors filed herein with this petition and so complained of, and that a transcript of the records, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States and that he may have such other and further relief in the premises as may be just.

GRACE, HUDNALL & FRIDLEY,
Attorneys for Plaintiff in Error.

Rooms 13-14-15 U. S. Nat'l Bank Bldg., Superior, Wisconsin.

Let a writ of error be issued upon the execution of a cost bond from Glenn Knapp to Alexander-Edger Lumber Company in the sum of Two Hundred Fifty Dollars ($250).

Dated this 10th day of March, 1913.

JNO. B. WINSLOW.
Chief Justice Supreme Court, State of Wisconsin.

10 STATE OF WISCONSIN:

Supreme Court.

Filed Office of the Clerk of Circuit Court Bayfield Co., Wis., Mar. 15, 1913. F. A. Bell.

GLENN KNAPP, Plaintiff in Error,
vs.
ALEXANDER-EDGER LUMBER COMPANY, a Corporation, Defendant in Error.

Assignments of Error.

Now comes the plaintiff in error and files herewith his petition for a writ of error and says there are errors in the records and proceedings in this cause and for the purpose of having the same reviewed by the Supreme Court of the United States makes and files this his assignments of error:

1. The Supreme Court of the State of Wisconsin erred in holding that one who had made an application to enter government land as a homestead and had received from the land office a Receiver's Receipt and paid the fee and who had gone upon the land for the purpose of ascertaining the character of the soil and the timber thereon, and to ascertain if any trespass had been committed thereon, but who had not established his actual residence in a house upon the land, could not, after he had established his actual residence upon the land in accordance with the laws of the United States and continuously reside thereon for the term of five (5) years as provided by the laws of the United States and made his final proof and receive his Receiver's final receipt and patent, maintain an action of trespass against a mere intruder who had gone upon the land between the date of the entry and the date of the establishing of actual residence and cut and removed timber therefrom.

2. That the Supreme Court of the State of Wisconsin, erred in holding that one who had entered government land, paid the fee, received the Receiver's final receipt, established his actual
11 residence upon the land within six (6) months after making the entry and had resided upon and had cultivated the land continuously for five (5) years, made his final proof, received a Receiver's final receipt and received his patent, was not in the constructive possession of the premises between the time of making his entry and establishing his actual residence.

3. That the Supreme Court of the State of Wisconsin, erred in

holding that an entryman, circumstanced as stated in the first and second assignment of errors, secures no title to the land he desires for a homestead until he has complied with the law and earned his patent.

4. That the Supreme Court of the State of Wisconsin, erred in holding that the right of action for a trespass, such as set forth in the first assignment of error, was vested in the United States as the owner of the land.

5. That the Supreme Court of the State of Wisconsin, erred in holding that there was but a single cause of action for a trespass, such as set forth in the first assignment of error and that such action could not be maintained by the homesteader even after he had obtained his patent.

6. That the Supreme Court of the State of Wisconsin, erred in holding that the United States, could prior to the issuing of the patent, settle with the trespasser for a trespass such as is set forth in the first assignment of error.

7. That the Supreme Court of the State of Wisconsin, erred in holding that a trespasser such as set forth in the first assignment of error herein, after the trespass had been investigated and reported to the Secretary of the Interior as an unintentional one, could extinguish the cause of action for the trespass by submitting a proposition of settlement to the Secretary of the Interior and paying to the United States, with the approval of the Secretary of the Interior, the stumpage value of the trespass.

8. That the Supreme Court of the State of Wisconsin,
12 erred in holding that patent issued as stated in the first assignment of error did not relate back and convey the title as of the date of the homestead entry so as to vest in the entryman the cause of action for a trespass such as stated in the first assignment of error.

9. That the Supreme Court of the State of Wisconsin, erred in holding that the United States after issuing a patent should be charged as trustee of the entryman for the amount collected by it for the trespass such as is set forth in the first assignment of error.

10. That the Supreme Court of the State of Wisconsin, erred in setting aside the judgment of the Circuit Court and remanding the case with direction to dismiss the complaint.

11. That the Circuit Court of Bayfield County, Wisconsin, erred in entering final judgment herein in compliance with the judgment of the Supreme Court of the State of Wisconsin, dismissing the complaint and adjudging that the plaintiff take nothing in this action.

For which errors and others apparent upon the fact of the record and proceedings the plaintiff in error prays that the judgment of the Supreme Court of the State of Wisconsin, be reversed, and a judgment rendered in favor of the plaintiff in error sustaining the judgment of the Circuit Court and for costs.

GRACE, HUDNALL & FRIDLEY.
Attorneys for Plaintiff in Error.

13 [Endorsed:] Original. No. —. State of Wisconsin, — County, Supreme Court. Glen Knapp, Plaintiff in error, vs. Alexander-Edger Lumber Co., a corporation, Defendant in error. Petition for Writ of Error and Assignments of Error. Due personal service of the within — is hereby admitted this — day of ——, 191–, Attorney for —. Grace, Hudnall & Fridley, Attorneys for Pl't'f, Berkshire Bldg., Superior, Wis.

14 STATE OF WISCONSIN:

Supreme Court.

Filed Office of the Clerk of Circuit Court, Bayfield Co., Wis., Mar. 15, 1913. F. A. Bell.

GLENN KNAPP, Plaintiff in Error,
vs.
ALEXANDER-EDGER LUMBER COMPANY, a Corporation, Defendant in Error.

Order Allowing Writ of Error.

This 10th day of March, 1913, came the plaintiff in error, by his attorneys, and filed herein and presented to the Court his petition praying also that a transcript of the records, proceedings and papers upon which final judgment herein was rendered by the Circuit Court of Bayfield County, Wisconsin, in compliance with the final judgment of the Supreme Court of the State of Wisconsin, duly authenticated, may be sent to the Supreme Court of the United States and that such other and further proceedings may be had as may be proper in the premises.

In consideration whereof the Court does allow a writ of error upon the plaintiff giving bond according to law in the sum of Two Hundred Fifty Dollars ($250) for all costs.

JNO. B. WINSLOW,
Chief Justice, Supreme Court of Wisconsin.

15 [Endorsed:] Original. No. —. State of Wisconsin. — County, Supreme Court. Glenn Knapp, Plaintiff in error, vs. Alexander-Edger Lumber Co., a corporation, Defendant in error. Order allowing writ of error. Due personal service of the within — is hereby admitted this — day of ——, 191–. —— ——, Attorney for —— ——. Grace, Hudnall & Fridley, Attorneys for Pl't'f, Berkshire Bldg., Superior, Wis.

16 STATE OF WISCONSIN:

Circuit Court, Bayfield County.

Filed Office of the Clerk of Circuit Court, Bayfield Co., Wis., Mar. 15, 1913. F. A. Bell.

GLENN KNAPP, Plaintiff in Error,
vs.
ALEXANDER-EDGER LUMBER COMPANY, a Corporation, Defendant in Error.

To the Honorable Supreme Court of the United States:

And now comes Glenn Knapp and prays for a reversal of the final judgment of the Circuit Court of Bayfield County, Wisconsin, entered pursuant to the judgment of the Supreme Court of the State of Wisconsin, in an action brought by Glenn Knapp, plaintiff and respondent, against Alexander-Edger Lumber Company, defendant and appellant, which judgment was entered in the office of the Clerk of the Circuit Court of Bayfield County on the 18th day of November, 1911, and by the Supreme Court of the State of Wisconsin, on the 14th day of March, 1911.

GRACE, HUDNALL & FRIDLEY,
Attorneys for Glenn Knapp.

Rooms 13-14-15 U. S. Nat'l Bank Bldg., Superior, Wisconsin.

17 [Endorsed:] Original. No. —. State of Wisconsin. — County, Supreme Court. Glenn Knapp, Plaintiff in error, vs. Alexander-Edger Lumber Co., a corporation, Defendant in error. Prayer for reversal. Due personal service of the within — is hereby admitted this — day of ——, 191–. —— ——, Attorney for —— ——. Grace, Hudnall & Fridley, Attorneys for pl't'f, Berkshire Bldg., Superior, Wis.

18 STATE OF WISCONSIN:

Supreme Court.

Filed Office of the Clerk of Circuit Court, Bayfield Co., Wis., Mar. 15, 1913. F. A. Bell.

GLENN KNAPP, Plaintiff in Error,
vs.
ALEXANDER-EDGER LUMBER COMPANY, a Corporation, Defendant in Error.

Bond.

Know all men by these presents, That we *are*, Glenn Knapp as principal and Maryland Casualty Company, of Baltimore, Md., as

surety, are held and firmly bound unto Alexander-Edger Lumber Company in the sum of Two Hundred Fifty Dollars ($250) to be paid to the said Alexander-Edger Lumber Company, its successors and assigns to which payment well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents. Sealed with our seals and dated this 25th day of February, 1913.

Whereas the above named plaintiff in error seeks to prosecute his writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Circuit Court of Bayfield County Wisconsin in compliance with the decision of the Supreme Court of the State of Wisconsin.

Now therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his writ of error to effect and if he fail to make good his plea and shall answer all costs then this obligation is to be void, otherwise to remain in full force and effect.

GLEN KNAPP,
By GEO. B. HUDNALL, *His Att'y.*
MARYLAND CASUALTY COMPANY,
By R. J. SHIELDS,
Attorney-in-Fact.

[Seal Maryland Casualty Company.]

19

State of Wisconsin,
Department of Insurance.

This is to Certify, that the Maryland Casualty Company of Baltimore Maryland has complied with all the provisions of law, and is authorized to transact the business of (7) fidelity or suretyship insurance in this State from the first day of March, 1912, until the twenty-eighth day of February, 1913, inclusive, unless its authority be sooner revoked.

Witness my hand and official seal, at Madison, Wisconsin, this first day of March 1912.

[SEAL.] HERMAN L. EKERN,
Commissioner of Insurance.

No. 3.

I, Herman L. Ekern, Commissioner of Insurance of the State of Wisconsin, hereby certify that I have compared the foregoing copy with the original certificate of authority, issued to the Maryland Casualty Company of Baltimore Md. *Company* and now on file and of record in my office and in my lawful custody, and that such copy is a true copy of said original and of the whole thereof.

Witness my hand and official seal at Madison, Wisconsin, this 22 day of March, A. D. 1912.

[SEAL.] HERMAN L. EKERN,
Commissioner of Insurance.

20 [Endorsed:] Original. No. —. State of Wisconsin. — County, Supreme Court. Glenn Knapp, Plaintiff in error, vs. Alexander-Edger Lumber Co., a corporation, Defendant in error. Bond. Due personal service of the within — is hereby admitted this — day of ——, 191–. —— ——, Attorney for —— ——. Grace, Hudnall & Fridley, Attorneys for pl't'f, Berkshire Bldg., Superior, Wis.

[Endorsed:] The within Bond approved both as to form and Sufficiency of Sureties March 10/1913. Jno. B. Winslow, Chief Justice Sup. Ct. Wis.

21 STATE OF WISCONSIN:

Circuit Court, Bayfield County.

GLENN KNAPP, Plaintiff in Error,
vs.
ALEXANDER-EDGER LUMBER COMPANY, a Corporation, Defendant in Error.

Certificate of Lodgment.

STATE OF WISCONSIN,
Bayfield County, ss:

I, F. A. Bell, Clerk of the Circuit Court of Bayfield County, Wisconsin, do hereby certify that there was lodged with me, as such clerk, on the 15th day of March, 1913, in the matter of Glenn Knapp vs. Alexander-Edger Lumber Company, originals and copies of the following: Petition for writ of error, Prayer for reversal, Assignments of error, Cost bond, Order allowing writ and Writ of error.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court in my office in the city of Washburn, State of Wisconsin, this 19th day of March, 1913.

[Seal Circuit Court, Bayfield Co., Wisconsin.]

F. A. BELL,
Clerk Circuit Court, Bayfield County, Wisconsin.

22 Circuit Court, Bayfield County.

Filed Office of the Clerk of Circuit Court, Bayfield County, Wis., May 10, 1910. F. A. Bell, Clerk.

GLENN KNAPP, Plaintiff,
vs.
ALEXANDER-EDGER LUMBER COMPANY, a Corporation, Defendant.

The State of Wisconsin to the said defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service and defend

the above entitled action in the court aforesaid; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint;

GRACE & HUDNALL,
Plaintiff's Attorneys.

P. O. Address, Superior, Douglas County, Wisconsin.

23 Circuit Court, Bayfield County.

Filed Office of the Clerk of Circuit Court, Bayfield County, Wis., May 10, 1910. F. A. Bell, Clerk.

GLENN KNAPP, Plaintiff,
vs.
ALEXANDER-EDGER LUMBER COMPANY.

Summons.

STATE OF WISCONSIN,
Marathon County, ss:

I hereby certify that on the 28th day of February, A. D. 1908, at Wausau in said County, I duly served the within summons on the defendant, by leaving a copy thereof with Walter Alexander who is Vice-President of the said corporation defendant.

Dated this 28th day of February, A. D. 1908.

FRANK O'CONNOR, *Sheriff*,
By JOHN L. SELL,
Under Sheriff.

Fees: Service 1.00
Copy ..... .50
Travel ..... .20

$1.70

24 Filed Office of the Clerk of Circuit Court, Bayfield County, Wisconsin, May 10, 1910. F. A. Bell, Clerk.

STATE OF WISCONSIN:

In Circuit Court, Bayfield County.

GLENN KNAPP, Plaintiff,
vs.
ALEXANDER-EDGAR LUMBER COMPANY, a Corporation, Defendant.

The above named plaintiff, by Grace and Hudnall, his attorneys, complains against the above named defendant and for cause of action alleges:

That at all the times herein mentioned the defendant was and still

is a corporation duly organized and existing under and by virtue of the laws of the state of Wisconsin.

That prior to the 21st day of February, 1902, the South Half of the Northeast quarter (S. ½ N. E. ¼), the Southeast quarter of the Northwest quarter (S. E. ¼ N. W. ¼) and the Northeast quarter of the Southeast quarter (N. E. ¼ S. E. ¼) of Section Three (3), Township Forty-six (46) North, of Range Nine (9) West, Bayfield County, Wisconsin, was government land and the title thereto in the United States, and the same was, on said date, subject to homestead entry under the laws of the United States.

That on the 21st day of February, 1902, the plaintiff, Glenn Knapp, duly entered said South half of the Northeast quarter (S. ½ N. E. ¼), Southeast quarter of the Northwest quarter (S. E. ¼ N. W. ¼), and the Northeast quarter of the Southeast quarter (N. E. ¼ S. E. ¼), Section 3, Township 46 North, Range 9 West, Bayfield County, Wisconsin, as a homestead under and pursuant to the laws of the United States governing homestead entries.

That said Glenn Knapp made final proof under his home-
25 stead entry on the 5th day of August 1907, and thereafter and on the 22nd day of January, 1908, a patent covering said South Half of the Northeast quarter (S. ½ N. E. ¼), Southeast quarter of the Northwest quarter (S. E. ¼ N. W. ¼) and Northeast quarter of the Southeast quarter (N. E. ¼ S. E. ¼), Section Three (3), Township Forty-six (46) North, Range Nine (9) West, Bayfield County, was duly issued by the United States to the Plaintiff, Glenn Knapp, and that ever since said 22nd day of January, 1908, the plaintiff, Glenn Knapp, has been and now is the owner in fee of said premises.

That on and between the 21st day of February, 1902, and the 10th day of April, 1902, the defendant, Alexander-Edgar Lumber Company, did unlawfully and without authority bread and enter upon the premises aforesaid and cut and remove therefrom Two Hundred Seventy-six (276) pine trees of the value of One Thousand Dollars ($1,000), and converted said trees and the logs cut therefrom for its own use by manufacturing the same into boards, joists, scantling and shingles, and studding, which, while in the possession of the defendant, Alexander-Edgar Lumber Company, were of the value of Twenty five Hundred Dollars ($2500) to the plaintiff's damage Twenty-five Hundred Dollars ($2500).

Wherefore the plaintiff, Glenn Knapp, demands judgment against the defendant, Alexander-Edgar Lumber Company, for the sum of Twenty Five Hundred Dollars ($2500) together with the costs and disbursements of this action.

GRACE & HUDNALL,
Plaintiff's Attorneys.

STATE OF WISCONSIN,
County of Douglas, ss:

Glenn Knapp, being first duly sworn, says that he is the plaintiff in the above entitled action; that he has read the foregoing complaint

and knows the contents thereof and that the same is true of his own knowledge.

GLENN KNAPP.

Subscribed and sworn to before me this 21st day of August, 1908.
[NOTARY SEAL.] HELEN A. HILL,
Notary Public, Douglas County, Wis.

My commission expires July 30, 1911.

26 [Endorsed:] 109–2584. Copy. No. —. State of Wisconsin, Bayfield County, Circuit Court. Glenn Knapp, Plaintiff vs. Alexander-Edgar Lumber Company, a corporation, Defendant, Complaint. Due personal service of the within complaint is hereby admitted at the City of Wausau in said State this 24th day of August, 1908. Kreutzer, Bird & Rosenberry, Attorney- for def't. Grace, Hudnall, Attorneys for pl'ff, Berkshire Bldg., Superior, Wis. Filed Dec. 3, 1910. Clarence Kellogg, Clerk of Supreme Court, Wisconsin.

27 STATE OF WISCONSIN:

In Circuit Court, Bayfield County.

GLENN KNAPP, Plaintiff,
vs.
ALEXANDER-EDGAR LUMBER COMPANY, a Corporation, Defendant.

Now comes the defendant by Kreutzer, Bird & Rosenberry, its attorneys, and for answer to the plaintiff's complaint herein, makes the following allegations:

The defendant admits that it was at the times mentioned in the complaint, and still is, a corporation duly organized under the laws of the State of Wisconsin.

That prior to the 21st day of February, 1902 the lands described in the plaintiff's complaint were government lands. That the title thereto was in the United States and that the same were subject to homestead entry under the laws of the United States.

Defendant further admits that on the 21st day of February, 1902 the plaintiff duly entered said lands as a homestead under and pursuant to the laws of the United States governing homestead entries, and that on or about the 22nd day of January, 1908, a patent was issued by the United States Government to the said plaintiff upon final proof made under his homestead entry on the 5th day of August, 1907.

This defendant further admits that between the 21st day of February, 1902, and the 10th day of April, 1902, it unintentionally and by mistake went upon a part of the lands described in the plaintiff's complaint and removed therefrom a number of pine trees, the amount and value of which defendant is unable to state.

Defendant denies that there were two hundred and Seventy-six (276) trees removed by it or that they were of the value of One

Thousand Dollars ($1,000.00), and further denies that they were of the value of Twenty-Five Hundred Dollars ($2,500.00) while in its possession and after they were manufactured by it into lumber.

28 Except as hereinbefore or hereinafter specifically admitted, qualified or denied, the defendant denies every allegation, thing and matter in the Plaintiff's complaint contained.

For a further answer and as a further dejense herein, this defendant alleges that prior to the 21st day of February, 1902, the Southeast quarter (S. E. ¼) of the Northeast quarter (N. E. ¼), southeast quarter (S. E. ¼) of the Northwest quarter (N. W. ¼) and the Northeast quarter (N. E. ¼) of the Southeast quarter (S. E. ¼) of Section Three (3), Township Forty Six (46) North, Range Nine (9) West, in the County of Bayfield, State of Wisconsin, was government land and that the title thereto was in the United States and that the same was on said date subject to homestead entry under the laws of the United States.

That on said 21st day of February, 1902, the plaintiff Glenn Knapp, filed in the United States Land Office at Ashland, Wisconsin, an application to enter said lands, a true and correct copy of which application together with the endorsement of the United States Land Office is hereto attached, marked Exhibit "A," and made a part hereof as if set out at length herein. That at the time of making such application, and contemporaneously therewith, the said Glenn Knapp filed in said Office a non-saline affidavit, a true and correct copy of which is hereto annexed, marked exhibit "B," and made a part hereof as if set out at length herein. That at the time of making such application and contemporaneously therewith the said Glenn Knapp duly filed in the United States Land Office at Ashland a homestead affidavit, a true and correct copy of which is hereto annexed, marked Exhibit "C," and m-de a part thereof as if set out at length herein. That at the time of making said application, and contemporaneously therewith, the said Glenn Knapp paid to the receiver of the United States Land Office at Ashland, Wisconsin, the entry fee of said land. That there was issued to him receiver's receipt No. 5164, a true and correct copy of which receipt is hereto attached, marked Exhibit "D," and made a part thereof as if set out at length herein.

29 This defendant further alleges that it was the owner of the North half (N. ½) of the Northeast quarter (N. E. ¼) and the North Hlaf (N. ½) of the Northwest quarter (N. W. ¼) of Section Three (3) Township Forty-six (46) North, Range Nine (9) West. That said section three is a fractional section and that the North row of forties owned by the defendant instead of being eighty (80) rods wide, as defendant supposed, were in fact only about sixty (60) rods in width. That the agents and employees of the defendant, believing said forties to be full width, surveyed south eighty fods from the Northeast corner of said section and in good faith proceeded to cut and remove from a strip eighty rods wide along the northern part of said section the timber then stand-

ing, lying and being thereon. Said timber was cut and removed between the 21st day of February, 1902, and the 10th day of April, 1902. That while so engaged in said cutting this defendant was notified by the plaintiff, who claimed to own said land, of the fact that it was cutting south of the true line of said land owned by the defendant in said Section Three. That thereupon this defendant immediately ceased cutting on said lands. That thereafter the United States Government, through its duly authorized agents, made a claim against the defendant on account of the value of the timber so cut and removed by the defendant on the lands described in the plaintiff's complaint. That thereupon this defendant and the United States agreed upon the amount of said trespass and the amount that should be paid in full settle-ent thereof, and that on the 3rd day of June, 1903, this defendant, pursuant to the terms of such settlement, duly paid the United States Government the sum of Three Hundred Twenty and 14/100 Dollars ($320.14) in full settlement of the damages claimed by the United States by reason of the cutting and removal of the said timber by the defendant on the lands described in the plaintiff's complaint, and the defendant alleges that the damages now claimed by the plaintiff in the above entitled action are the same damages for which the United States Government made claim against the defendant and the amount of which this defendant duly paid to the United States Government.

30 This defendant further alleges that the plaintiff, Glenn Knapp did not establish his residence upon the lands described in his complaint until the 1st day of August, 1902. That the plaintiff well knew at the time he established his residence on said land that the defendant had cut and removed some timber therefrom and the plaintiff at the time of making final proof and application for a patent, which he thereafter accepted, well knew that the defendant had paid to the United States the amount of the damages claimed by the United States on account thereof.

Defendant further alleges that the plaintiff, Glenn Knapp, made final proof under his homestead entry on the 5th day of August, 1907, and that thereafter and on the 22nd day of January, 1908, a patent was issued by the United States Government to the Plaintiff, conveying to him the lands described in his application to make homestead entry. That said patent was in the usual form of patents issued by the United States Government and did not contain any assignment of the trespass or attempt to convey or assign to the plaintiff any right, title or interest in or to any claim for trespass other than such as might pass, if any should pass, by the conveyance of the land.

Wherefore, defendant prays that the plaintiff take nothing by his said complaint, and the defendant have and recover of the plaintiff its costs and disbursements herein.

KREUTZER, BIRD & ROSENBERRY,
Defendant's Attorneys.

31 STATE OF WISCONSIN,
Marathon County, ss:

Alexander Stewart, being first duly sworn, on oath deposes and says: that he is an officer, to wit: the President, of the above named defendant company, Alexander-Edgar Lumber Company, a corporation; that he makes this verification for and on behalf of the defendant as such officer, being duly authorized so to do; that he has read the foregoing answer, and knows the contents thereof, and that the matters therein stated are true to his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he verily believes it to be true.

ALEXANDER STEWART.

Subscribed and sworn to before me this 17th day of Oct., A. D. 1908.

M. B. ROSENBERRY,
Notary Public, Marathon Co., Wis.

32 EXHIBIT "A."

(4–007.)

Application No. 5164.

Homestead.

LAND OFFICE AT ASHLAND, WIS., February 20, 1902.

I, Glenn Knapp, of West Superior Douglas Co. Wis. do hereby apply to enter, under Section 2289, Revised Statutes of the United States, the S. E. ¼ N. W. ¼, S. ½ N. E. ¼ and N. E. ¼ S. E. ¼ of Section Three, in Township 46 of Range 9 containing 160 acres.

GLENN KNAPP.

LAND OFFICE AT ASHLAND, WIS., Feb. 21, 1902.

I, Aug. Doenitz, Register of the Land Office, do hereby certify that the above application is for Surveyed Lands of the class which the applicant is legally entitled to enter under Section 2289, Revised Statutes of the United States, and that there is no prior valid adverse right to the same.

AUG. DOENITZ, *Register.*

33 [Endorsed:] No. 5164. Homestead Application. Glenn Knapp. Douglas County, Wisconsin. Feb. 21, 1902. Section 3, Town 46 N., Range 9 W.

34 EXHIBIT "B."

4-062a.

Non-Saline Affidavit.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,
SUPERIOR, WIS., Feb'y 26th, 1902.

Glenn Knapp, being duly sworn according to law, deposes and says that he is the identical *H*lenn Knapp who is an applicant for Government title to the Bayfield Co. Section 3, 46, 9. S. ½ N. E. ¼, Se. ¼ of Nw. ¼, N. E. ¼ of S. E. ¼; that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not, to his knowledge, within the limits thereof, any salt spring, or deposits of salt in any form, such as make it chiefly valuable on account thereof; that no portion of said land is claimed for saline purposes; that said land — essentially non-saline land, and that his application therefor is not made for the purpose of fraudulently obtaining title to saline land, but with the object of securing said land for agricultural purposes, and that his post-office address is 2001. 21st St. West Superior, Wis.

GLENN KNAP.

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by —— ——? and that I verily believe him to be a credible person and the person he represents himself to be, and that
35 this affidavit was subscribed and sworn to before me at my office in Superior, within the Ashland land district, on this 26th day of February, 1902.

[SEAL.]

WILLIAM H. LOCKE,
Cl'k Cir. C'rt Douglas Co., Wis.,
By J. G. EVANS, *Dep. Cl'k.*

36 EXHIBIT "C."

4-063.

Homestead Affidavit.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,
ASHLAND, WIS., Feb. 20, 1902.

I, Glenn Knapp, of West Superior, Douglas Co. Wis., having filed my application No. 5164, for an entry under section 2289,

Revised Statutes of the United States, do solemnly swear that I am not the proprietor of more than one hundred and sixty acres of land in any State or Territory; that I am the head of a family, and am a native born citizen of the United States, having been born in Erie County Pa., and am unable to attend the U. S. Land Office in person on account of the distance & expenses * * * that my said application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation, and that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that I am not acting as agent of any person, corporation, or syndicate in making such entry, not in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation, or syndicate whatsoever, by which the title which I might acquire from the Government of the United States should inure, on whole or in part, to the benefit of any person except myself, and further, that since August 30, 1890, I have not entered under the land laws of the United States, or filed upon, a quantity of land, agricultural in Character, and not mineral, which, with the tracts now applied for, would made more than three hundred and twenty acres, and that I have not heretofore made any entry under the homestead laws.

GLENN KNAPP.

Sworn to and subscribed before me this 20 day of February, 1902, at my office at Superior in Douglas County, Wisconsin.

[SEAL.] WM. H. LOCKE,
Cl'k Cir. C'rt Douglas County, Wis.,
By J. G. EVENS, *Dep. Cl'k.*

37 EXHIBIT "D."

(4-137.)

Application No. 5164.

Receiver's Receipt No. 5164.

Homestead.

RECEIVER'S OFFICE,
ASHLAND, WIS., February 21, 1902.

Received of Glenn Knapp of West Superior, Wis., the sum of Eighteen Dollars .& no cents; being the amount of fee and com-

pensation of Register and Receiver for the entry of S. E. ¼ N. W. ¼, S. ½ N. E. ¼ and N. E. ¼ S. E. ¼ of Section 3 in Township 46 N. of Range 9 W., under Section No. 2290, Revised Statutes of the United States.

D. G. SAMPSON, *Receiver.*

$18.00.

38 [Endorsed:] Filed Dec. 3, 1910. Clarence Kellogg, Clerk of Supreme Court, Wisconsin.

39 [Endorsed:] Circuit Court Bayfield County. Glenn Knapp, Plaintiff, vs. Alexander-Edgar Lumber Co., a corporation, Defendant. Answer. Copy. Due service of a copy of within answer admitted this 22nd day of October, A. D. 1908. Grace & Hudnall, Plaintiff's Attorneys. Filed Office of the Clerk of Circuit Court Bayfield County, Wis., May 10, 1910. F. A. Bell, Clerk. Kreutzer, Bird & Rosenberry, Attorneys at Law, Wausau, Wisconsin. Filed Dec. 3, 1910. Clarence Kellogg, Clerk of Supreme Court, Wisconsin.

40 STATE OF WISCONSIN:

Circuit Court Bayfield County.

Filed Office of the Clerk of Circuit Court Bayfield Co., Wis., Oct. 4, 1910. F. A. Bell, Clerk.

GLENN KNAPP, Plaintiff,
vs.
ALEXANDER-EDGAR LUMBER COMPANY, a Corporation, Defendants.

This action coming on for trial at the regular May term of said Court, and having been tried before the Court on the 10th day of May, 1910, a jury trial having been expressly waived by stipulation of the parties in open Court, Grace & Hudnall appearing for the plaintiff and Kreutzer, Rosenberry, Bird & Okoneski appearing for the defendant. After hearing the allegations and proofs of the parties, the arguments of counsel, and being fully advised in the premises, I hereby make and file the following findings of fact and conclusions of law constituting my decision in this action:

Findings of Fact.

I.

That prior to the 20th day of February, 1902, the South Half of the North East Quarter (S. ½ of N. E. ¼), the South East Quarter of the North west Quarter (S. E. ¼ of N. W. ¼) and the North East Quarter of the South East Quarter (N. E. ¼ of S. E. ¼) of Section Three (3), Township Forty six (46) North, Range Nine (9) West, Bayfield County, Wisconsin, was government land, the

title thereto was vested in the United States and the same was, on said date, subject to homestead entry under the laws of the United States.

41 II.

That on the 20th day of February, 1902, the plaintiff duly made an application at the United States local land office at Ashland, Wisconsin, to enter said land, which application was in words and figures as follows, to-wit:

(4-007.)

Application No. 5164.

Homestead.

LAND OFFICE AT ASHLAND, WIS., February 20, 1902.

I, Glenn Knapp, of West Superior, Douglas Co., Wis., do hereby apply to enter, under Section 2289, Revised Statutes of the United States, the S. E. ¼ N. W. ¼, S. ½ N. E. ¼ and N. E. ¼ S. E. ¼ of Section Three, in Township 46 of Range 9, containing 160 acres.

GLENN KNAPP."

III.

That on the 21st day of February, 1902, August Doenitz, the Register of the United States Land Office at Ashland, Wisconsin, attached to said application, a certificate which was in words and figures as follows, to-wit:

"LAND OFFICE AT ASHLAND, WIS., Feb. 21, 1902.

I, Aug. Doenitz, Register of the Land Office, do hereby certify that the above application is for Surveyed Lands of the class which the applicant is legally entitled to enter under Section 2289, Revised Statutes of the United States, and that there is no prior valid adverse right to the same.

AUG. DOENITZ, *Register.*"

IV.

That on the 20th day of February, 1902, the plaintiff duly made a homestead affidavit in words and figures as follows, to-wit:

42 (4-063.)

Homestead Affidavit.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,
ASHLAND, WIS., February 20, 1902.

I, Glenn Knapp, of West Superior, Douglas Co. Wis., having filed my application No. 5164, for an entry under section 2289, Revised Statutes of the United States, do solemnly swear that I am not the proprietor of more than one hundred and sixty acres of land in any state or territory; that I am the head of a family, and am a native born citizen of the United States, having been born in Erie Co. Pa., and am unable to attend the U. S. Land Office in person on account of the distance & expenses * * * that my said application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation, and that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that I am not acting as agent of any person, corporation, or syndicate in making such entry, not in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not directly or indirectly made, and will not make, any agreement of contract in any way or manner with any person or persons, corporation, or syndicate whatsoever, by which the title which I might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except myself, and further, that since August 30, 1890, I have not entered under the land laws of the United States, or filed upon, a quantity of land, agricultural in character, and not mineral, which, with the tracts now applied for, would make more than three hundred and twenty acres, and that I have not heretofore made any entry under the homestead laws.

GLENN KNAPP.

Sworn to and subscribed before me this 20 day of February, 1902, at my office at Superior, in Douglas County, Wisconsin.

[SEAL.] WM. H. LOCKE,
Cl'k Cir. C'rt Douglas Co., Wis.,
By J. G. EVANS, *Dept. Cl'k.*"

V.

That on the 21st day of February, 1902, the plaintiff duly received from D. G. Sampson, the receiver of the Land Office at Ashland, Wisconsin, a receiver's receipt in words and figures as follows, to-wit:

43 (4-137.)

Application No. 5164.

"Receiver's Receipt No. 5164.

Homestead.

RECEIVER'S OFFICE,
ASHLAND, WIS., February 21, 1902.

Received of Glenn Knapp of West Superior, Wis., the sum of Eighteen Dollars and no cents; being the amount of fee and compensation of Register and Receiver for the entry of S. E. ¼ N. W. ¼, S. ¼ N. E. ¼ and N. E. ¼ S. E. ¼ of Section 3 in Township 46 N. of Range 9 W., under Section No. 2290, Revised Statutes of the United States.

D. G. SAMPSON, *Receiver.*

$18.00.

VI.

That on the 26th day of February, 1902, the plaintiff duly made a non-saline affidavit, in words and figures as follows, to-wit:

4-062a.

Non-Saline Affidavit.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,
SUPERIOR, WIS., Feb'y 26th, 1902.

Glenn Knapp, being *f*uly sworn according to law, deposes and says that he is the indentical Glenn Knapp who is an applicant for Government title to the Bayfield Co. Section- 3, 46, 9, S. ½ N. E. ¼, S. E. ¼ of N. W. ¼, Ne. ¼ of S. E. ¼; that he is well acquainted with the character of said described land, and with each and every subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not to his knowledge, within the limits thereof, any salt spring, or deposits of salt in any form, such as make it chiefly valuable on account thereof; that no *p*rotion of said land is claimed for saline purposes; that said land is essentially non-saline land, and that his application therefor is not made for the purpose of fraudulently obtaining title to saline land, but with the object of securing said land for agricultural purposes, *with the object of securing said land for agricultural purposes,* and that his post-office address is 2001, 21st St. West Superior, Wisconsin.

GLENN KNAPP.

44 I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by —— ——. And that I verily believe him to be a credible person and the person he represents himself to be, and that this affidavit was subscribed and sworn to before me at my office in Superior, within the Ashland land District, on this 26th day of February, 1902.

WM. H. LOCKE,
Clk Cir. C'rt Douglas Co., Wis.,
By J. C. EVANS, *Dep. Clk.*

VII.

That the foregoing application, certificate, homestead affidavit, receiver's receipt and *ono*-saline affidavit were filed with and became part of the records of the Office of the United States Land Office at Ashland, Wisconsin, and together duly constituted the homestead entry of the plaintiff in and to the lands described in said application and receipt, under and pursuant to the Laws of the United States governing homestead entries.

VIII.

That on February 10th, 1902, the plaintiff went upon the land in question for the purpose of ascertaining the character of the soil and the timber thereon, intending, if the same were satisfactory, to enter the same as a homestead. On March 20th, 1902, the plaintiff went upon the land in question to see if *if* any trespass had been committed thereon. That on April 5th, 1902, the plaintiff again went upon the land in question temporarily and found the employees of the defendant, cutting the timber thereon, and forbade them cutting any more of the timber. On July 1st, 1902, and within six months after the making of said homestead entry, the plaintiff established his actual residence in a house upon the lands and resided upon and cultivated the land continuously thereafter in accordance with the Laws of the United States, for a term of five years.

45 IX.

That on August 5th, 1907, the plaintiff duly made final proof under said homestead entry and received a receiver's final receipt therefor.

X.

That on January 22, 1908, a patent was duly issued from the United States to the plaintiff, conveying to him the lands described in the first finding of fact herein. That ever since the 22nd day of January, 1908, the plaintiff has been and now is the owner of said premises in fee.

XI.

That on and between the 20th day of March, 1902, and the 7th day of April, 1902, the defendant, by its agents, servants employees and loggin- outfit, entered upon the lands described in the first findings of fact herein, and cut and removed therefrom wilfully, unlawfully and without authority, 49,190 feet of pine timber.

XII.

That thereafter and prior to July 7, 1903, a special agent of the United States investigated said trespass and reported the amount thereof to the Secretary of the Interior, accompanied by a proposition of settlement in the sum of Three Hundred Twenty Dollars and Fourteen Cents ($320.14), submitted by the Alexander Edgar Lumber Company after the trespass had been estimated which proposition of settlement was accompanied by a certified check, dated Iron River, Wisconsin, June 3, 1903, for Three Hundred Twenty Dollars and Fourteen Cents ($320.14), issued by the Iron River Bank for the Alexander-Edgar Lumber Company, and payable to the commissioner of the General Land Office.

46 That on the 7th day of July, 1903, the Secretary of the Interior made the following communication and direction to the Commissioner of the General Land Office:

Commission- of General Land Office.

Sirs: "I am in receipt of your office letter "P" of the 3rd instant submitting a report in the above entitled case by Special Agent T. B. Nehausen accompanied by a proposition of settlement in the sum of $320.14, submitted by the Alexander and Edgar Lumber Company.

The trespass involved the cutting of 49,190 feet of timber from lands covered by the homestead entry of Glenn Knapp, and is reported to have been an unintentional one, the company having taken reasonable precautions, through its agent, Superintendent O'Connell.

The amount offered in settlement being the measure of damages due the Government under the ruling in the Wooden-Ware case (106 U. S., 432), plus the cost of scaling and surveying, acceptance of the offer is recommended by your office and by the Special Agent.

I concur in there recommendations. The proposition of settlement is hereby accepted and you are directed to take the necessary supplemental action."

That pursuant to the directions contained in said letter of the Secretary of the Interior, the Commissioner of the General Land Office, under date of July 13, 1903, addressed the following direction and communication to the receiver of Public Moneys, Ashland, Wisconsin:

Receiver of Public Moneys, U. S. Land Office, Ashland, Wis.

Sir: "By direction of the Secretary of the Interior, dated July 7, 1903, the proposition of the Alexander and Edgar Lumber Com-

pany, of Iron River, Wisconsin, to pay the sum of $320.14
47 in settlement for the unlawful cutting of 49,190 feet of timber from S. ½ N. E. ¼ and S. E. ¼ N. W. ¼, and N. E. ¼ S. E. ¼, S. 3, T. 46 N., R. 9 W., 5th P. M., Wisconsin, reported by Special Agent Thoman B. Neuhausen to this office under date of June 5, 1903, is accepted.

You will issue duplicate receipts for the certified check for said sum enclosed herein, one of which you will at once transmit to this office, referring to this letter by its date and initial and stating name and case.

You will deposit the money received in the Treasury of the United States in the same manner as *money* received from the sale of public lands, but specifying that the same is on account of depredations upon the public timber, without stating the fiscal year, making report to this office in separate account-current, together with statement in relation thereto."

That on July 13th, 1903, the General Land Office addressed the following direction and communication to the Chief of Division of Accounts:

Chief of Division of Accounts:

"The Receiver of Public Moneys at Ashland, Wisconsin, has this day been directed to receive from Alexander and Edgar Lumber Company the sum of Three Hundred and Twenty and 14/100 Dollars ($320.14) in settlement for 49,190 feet of timber unlawfully cut from S. ½ N. E. ¼ and S. E. ¼ N. W. ¼ and N. E. ¼ S. E. ¼, S. 3, T. 46 N., R. 9 W., 5th P. M., Wisconsin, in accordance with their proposition accepted by the Honorable Secretary of the Interior under date of July 7, 1903."

That in accordance with the directions of the Commissioner of the General Land Office, the Receiver of Public Moneys at Ashland, Wisconsin, cashed the certified check heretofore mentioned and deposited the money received therefrom in the Treasury of the United States. That the Alexander-Edgar Lumber Company paid said sum, and the United States of America received said sum under the conditions set forth in these findings.

48 XIII.

That after the plaintiff received his patent to said lands he demanded from the United States government said sum of Three Hundred Twenty and 14/100 Dollars, which sum and the whole thereof the United States Government refused to pay.

XIV.

That the cutting of said 49,190 feet of pine timber from the lands in question was not done by the defendant by mistake and the defendant did not, at or before the time of the service of his answer herein, serve on the plaintiff his affidavit that such cutting was done

by mistake, or offer, in writing, to allow judgment to be taken against it for any sum whatsoever, as provided by Section 4269, Statutes of 1898. That the stumpage value of said 49,190 feet of pine timber, was Five Dollars Per Thousand. That the highest market value of said 49,190 feet of pine timber before the trial and while in the possession of the defendant, was Twelve ($12.00) Dollars per Thousand.

XV.

That the timber cut and removed from the land in question by the defendant and which it paid the United States Government $320.14 for as hereinbefore found, is the same timber for the value of which the plaintiff brings and maintains this action *action*.

Conclusions of Law.

I.

That the payment by the defendant to the receivers of the public money at Ashland, Wisconsin, of the sum of Three Hundred
49 Twenty and 14/100 Dollars is void as against the Plaintiff and does not, as against him, amount to a settlement for the unlawful cutting and removal of the 49,190 feet of pine timber cut and removed from the lands in question.

II.

That the plaintiff is entitled to recover from the defendant, Twelve ($12.00) Dollars per thousand for the timber cut and removed from the land in question.

III.

That the plaintiff is entitled to recover from the defendant, the sum of Five Hundred Ninety and 28/100 ($590.28) Dollars, together with interest thereon at the rate of six per cent (6%) per annum since the 22nd day of January, 1908 and his costs and disbursements to be taxed and allowed herein, and that judgment be entered accordingly.

Dated this 11th day of July, 1910.

By the Court:

JOHN K. PARISH,
Circuit Judge.

50 [Endorsed:] Original Copy. No. —. State of Wisconsin Bayfield County, Circuit Court. Glenn Knapp, Plaintiff vs. Alexander-Edgar Lumber Company, Defendant. Findings of Fact and Conclusions of Law. Due personal service of the within — is hereby admitted this — day of ——, 191–. —— ——, Attorney for —— ——. Grace, Hudnall & Fridley, Attorneys for —— ——. Berkshire Bldg., Superior, Wis.

[Endorsed:] Filed Office of the Clerk of Circuit Court, Bayfield County, Wis. Oct. 4, 1910. F. A. Bell, Clerk.
[Endorsed:] Filed Dec. 3, 1910. Clarence Kellogg, Clerk of Supreme Court, Wisconsin.

51 STATE OF WISCONSIN:

Circuit Court, Bayfield County.

GLENN KNAPP, Plaintiff,
vs.
ALEXANDER-EDGAR LUMBER COMPANY, a Corporation, Defendant.

Filed Office of the Clerk of Circuit Court, Bayfield County, Wis., Oct. 4, 1910, F. A. Bell, Clerk.

At a Regular Term of the Circuit Court for Bayfield County, Wisconsin, Begun and Held at the Court-house in the City of Washburn, in the said County and State, on the 2nd day of May, 1910, and on a subsequent day of said term, to-wit: on the 11th day of July, 1910.

Present, Honorable John K. Parish, Circuit Judge Presiding.

The above entitled action having been duly noticed for trial at the May, 1910, term thereof, and having been duly reached for trial before the court on the 10th day of May, 1910, a jury trial having been expressly waived by stipulation of the parties in open court, and the same having been tried before the court on the 10th day of May, 1910, Grace and Hudnall appearing for the plaintiff, and Kreutzer, Rosenberry, Bird and Okeneski appearing for the defendant, and the court having heard the allegations and proofs of the parties, and arguments of counsel and being fully advised in the premises did on the 11th day of July, 1910, make his findings of fact and conclusions of law herein wherein he found generally for the plaintiff and against the defendant, and that the cutting of the timber was not done by mistake, and ordered that the plaintiff have judgment against the defendant for the sum of Five Hundred Ninety and 28/100 Dollars ($590.28), the highest market value of the timber before the trial and while in the possession of the defendant, together with interest thereon at the
52 rate of six per cent per annum since — day of ——, together with his costs and disbursements.

Now therefore on motion of Grace and Hudnall, Attorneys for the plaintiff it is,

Ordered, decreed and adjudged that the plaintiff, Glenn Knapp, do have and recover from the defendant, Alexander-Edgar Lumber Company, the sum of Five Hundred Ninety and 28/100 Dollars ($590.28), together with the interest thereon at the rate of six (6) per cent per annum since the 22nd day of January, 1908, amounting to Fifty and 66/100 ($50.66) Dollars, together with his costs and disbursements in the sum of Seventy three and

93/100 Dollars ($73.93), as taxed and allowed herein, in all the sum of Seven Hundred and Fourteen and 87/100 Dollars ($714.87).

By the Court,

F. A. BELL, *Clerk.*

Damages	$590.28
Int.	50.66
	$640.94
Costs	73.93
	$714.87

53 [Endorsed:] Original Copy. No. —. State of Wisconsin. Bayfield County, Circuit Court. Glenn Knapp, Plaintiff vs. Alexander-Edgar Lumber Company, Defendant. Grace, Hudnall & Fridley, Attorneys for —— ——. Berkshire Bldg., Superior, Wis. Filed office of the Clerk of Circuit Court. Bayfield County, Wisconsin, Oct. 4, 1910. F. A. Bell, Clerk. Filed Dec. 3, 1910. Clarence Kellogg, Clerk of Supreme Court, Wisconsin.

54 Filed — Office of the Clerk of Circuit Court, Bayfield County, Wis., Dec. 1, 1910. F. A. Bell, Clerk.

[Form No. 134.]

Notice of Appeal to Supreme Court—R. S. 3049.

In Circuit Court, Bayfield County.

GLENN KNAPP, Plaintiff and Respondent,

vs.

ALEXANDER-EDGAR LUMBER CO., Defendant & Appellant.

To Grace & Hudnall, Attorneys for def't & Respondent, and F. A. Bell, Clerk of the aforesaid court:

Please take notice that the Alexander and Edgar Lumber Co., defendant, appeals to the Supreme Court of the State of Wis. from the judgment rendered by the above named court herein, entered on the 4th day of October, A. D. 1910, in favor of the plaintiff and against the defendant, and from the whole and every part thereof.

Yours, etc.,

KREUTZER, BIRD, ROSENBERRY & KINESKI, *Attorneys for Def't.*

55 [Endorsed:] Copy. Circuit Court, Bayfield County. Glenn Knapp, Plaintiff & Respondent, vs. Alexander & Edgar Lumber Co., Defendant & Appellant. Notice of Appeal to Supreme Court. Due service of within notice of appeal admitted this 1st day of December, 1910. F. A. Bell, Clerk. Filed Office of the

Clerk of Circuit Court. Bayfield Co., Wis. Dec. 1, 1910. F. A. Bell, Clerk. Filed Dec. 3, 1910. Clarence Kellogg, Clerk of Supreme Court, Wisconsin.

56 **Form 159.**

Filed Office of the Clerk of Circuit Court, Bayfield Co., Wis., Dec. 1, 1910. F. A. Bell, Clerk.

Undertaking on Appeal, for Costs and to Stay Execution on Money Judgment.—R. S., 3052, 3053, & 3054.

In Circuit Court, Bayfield County.

GLENN KNAPP, Plaintiff & Respondent,
vs.
ALEXANDER-EDGAR LUMBER CO., Defendant & Appellant.

Whereas, on the Eleventh day of June, A. D. 1910, in the Circuit Court of Bayfield county, Glenn Knapp, the above-named respondent, recovered a judgment against Alexander-Edgar Lumber Co. the above-named appellant, for Six Hundred and forty & 94/100 dollars damages, and Seventy-three and 93/100 dollars costs, amounting in the aggregate to Seven Hundred fourteen 87/100 dollars damages and costs. And the above named appellant, feeling aggrieved thereby, intend- to appeal therefrom to the Supreme Court of the State of Wisconsin;

Now, Therefore, we, Alexander Stewart of the City of Wausau, county of Marathon, and State of Wisconsin, and Walter Alexander of the City of Wausau, county of Marathon, and State of Wisconsin, do hereby, pursuant to the statute in such case made and provided, undertake that the said appellant will pay all costs and damages which may be awarded against it on said appeal, not exceeding two hundred and fifty dollars; and do also undertake that if the said judgment so appealed from, or any part thereof, be affirmed, the said appellant will pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against said appellant on the said appeal.

ALEXANDER STEWART.
WALTER ALEXANDER.

STATE OF WISCONSIN,
Marathon County, ss:

Alexander Stewart being duly sworn, says he is one of the subscribers to the foregoing undertaking; that he is a resident and householder or freeholder within the State of Wisconsin, and is worth the sum of Five Thousand dollars over and above all his debts and liabilities, in property within the State of Wisconsin, not by law exempt from execution.

ALEXANDER STEWART.

Subscribed and sworn to before me, this 29th day of Novembe
A. D. 1910.

M. B. ROSENBERRY,
Notary Public, M. C.

STATE OF WISCONSIN,
Marathon County, ss:

Walter Alexander being duly sworn, says he is one of the sub
scribers to the foregoing undertaking; that he is a resident an
householder or freeholder within the State of Wisconsin, and is wort
the sum of Five Thousand dollars over and above all his debts an
liabilities, in property within the State of Wisconsin, not by la
exempt from execution.

WALTER ALEXANDER.

Subscribed and sworn to before me, this 29th day of Novembe
A. D. 1910.

M. B. ROSENBERRY,
Notary Public, M. C.

57 [Endorsed:] Circuit Court, *Court*, Bayfield County. Glen
Knapp, Plaintiff & Respondent, vs. Alexander & Edgar Lum
ber Co., Defendant and Appellant. Undertaking on Appeal. Du
service of within undertaking on appeal admitted this 1st day o
December, 1910. F. A. Bell, Clerk. Filed Office of the Clerk o
Circuit Court, Bayfield County, Wisconsin. Dec. 1, 1910. F. A
Bell, Clerk. Filed Dec. 3, 1910. Clarence Kellogg, Clerk of Su
preme Court, Wis.

58 STATE OF WISCONSIN:

Circuit Court, Bayfield County.

GLENN KNAPP, Plaintiff,
vs.
ALEXANDER-EDGAR LUMBER COMPANY, a Corporation, Defendan

We hereby admit service of a copy of the notice of appeal an
undertaking on appeal as of this 30th day of November, 1910.

GRACE & HUDNALL,
Attorneys for Plaintiff & Respondent.

Filed Office of the Clerk of Circuit Court, Bayfield county, Wi
consin, Dec. 2, 1910. F. A. Bell, Clerk.

59 [Endorsed:] Filed Dec. 3, 1910. Clarence Kellogg, Cler
of Supreme Court, Wis.

60 Circuit Court, Bayfield County.

GLENN KNAPP, Plaintiff,
vs.
ALEXANDER & EDGAR LUMBER CO., Defendant.

STATE OF WISCONSIN,
County of Bayfield, ss:

I, F. A. Bell, Clerk of said Court, do hereby certify that the annexed papers are all the original files in the above entitled action, and are hereby transmitted to the Supreme Court pursuant to the undertaking and notice of appeal filed herein December 1st, 1910.

Witness my hand and official seal this 2nd day of December, A. D. 1910.

F. A. BELL, *Clerk.*

61 [Endorsed:] Filed Dec. 3, 1910. Clarence Kellogg, Clerk of Supreme Court, Wis.

62 [Endorsed:] Original Copy. No. —. State of Wisconsin, Bayfield County, Circuit Court. Glenn Knapp, Plaintiff, vs. Alexander & Edgar Lumber Co., Defendant. Filed Dec. 3, 1910. Clarence Kellogg, Clerk of Supreme Court, Wis. Grace, Hudnall & Fridley, Attorneys for —— ——, Berkshire Bldg., Superior, Wis.

63 Be it remembered, That at a term of the Supreme Court of the State of Wisconsin begun and held at the Capitol, in Madison, the seat of government of said State, on the second Tuesday, to-wit: on the 10th day of January, A. D. 1911, on the seventeenth dat of the term, to-wit: On the 14th day of March, A. D. 1911. Present, John B. Winslow, Chief Justice, R. D. Marshall, Robert G. Siebecker, James C. Kerwin, William H. Timlin, John Barnes and Aad J. Vinje, Justices of said Court, the following proceedings were had, Inter Alia, to-wit:

GLENN KNAPP, Respondent,
vs.
ALEXANDER & EDGAR LUMBER CO., Appellant.

Appeal from Circuit Court, Bayfield County, State of Wisconsin.

This cause came on to be heard on appeal from the judgment of the Circuit Court of Bayfield County and was argued by counsel. On Consideration whereof; it is now here ordered and adjudged by this court, that the judgment of the Circuit Court of Bayfield County in this cause, be and the same is hereby reversed, with costs against the said respondent, taxed at the sum of Eighty-eight and 60/100 Dollars ($88.60).

And that this cause be and the same is hereby remanded to the said Circuit Court with directions to dismiss the complaint herein.

Justice Siebecker took no part.

STATE OF WISCONSIN,
Supreme Court, ss:

I, Clarence Kellogg, Clerk of the Supreme Court of the State o Wisconsin, do hereby certify that I have compared the above an foregoing with the original order and judgment of the Court in th above entitled cause, and that it is a correct transcript therefro and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixe the seal of said Court, at Madison, this 17th day of April, A. D. 191

[SEAL.] CLARENCE KELLOGG,
Clerk of the Supreme Court of the State of Wisconsin.

64 [Endorsed:] State of Wisconsin, Supreme Court. Glen Knapp, Respondent, vs. Alexander & Edgar Lumber Co Appellant. Remittitur. Filed, Office of the Clerk of Circuit Cour Bayfield Co., Wis., April 18, 1911. F. A. Bell, Clerk.

65 Filed Office of the Clerk of Circuit Court, Bayfield Co., Wis. April 18, 1911. F. A. Bell, Clerk.

GLENN KNAPP, Respondent,
vs.
ALEXANDER & EDGAR LUMBER COMPANY, Appellant.

This is an action brought to recover damages for a tresp ss com mitted on the homestead of the plaintiff. On February 20, 1902 pursuant to section 2289, Rev. St. U. S. 9 U. S. Comp. St. 1901 p. 1380, plaintiff made application for a homestead entry on th land upon which the trespass was afterwards committed. The regis ter of the land office attached a certificate to such application, re citing that the application was made for lands subject to entry under the homestead act, and that there was no prior adverse right to the same. At the time of making his application plaintif also filed an affidavit showing that he was entitled to make a home stead entry under the laws of the United States. On February 21s the receiver of the land office acknowledged receipt of the sum o $18, being the amount of fee compensation to which the registe and receiver were entitled on the entry. On February 26, 1902 plaintiff filed the non-saline affidavit required by law. The fore going papers constituted the homestead entry of the plaintiff in the lands described in the application. The trespass was committed on and between March 20, 1902, and April 7th of the same year; the defendant cutting and removing from said lands 49,140 feet of pine saw logs. On July 1, 1902, the plaintiff established his resi dence on said land and continued to reside thereon for five years, and made his final proffs in August, 1907, when a final receiver's receipt was issued to him. This was followed by a patent which was issued in January, 1908. Plaintiff looked the land over once before making his entry, for the purpose of informaing himself as to its

value. On March 20th he went upon the land to see if any trespass had been committed thereon, and on April 5th went upon the land for the same purpose, and found the defendant cutting
66 timber, and forbade its cutting any more. On July 13, 1903, the United States collected from the defendant the value of the logs cut and removed from the plaintiff's homestead; the amount collected being $320.14. After receiving his patent, the plaintiff commenced this action and recovered judgment for the value of the lumber cut from the logs removed from the plaintiff's homestead: the amount recovered being $714.87. Defendant appeals from such Judgment.

BARNES, *J.:*

That the plaintiff at the time of the cutting was not in the actual possession of the land from which the timber sued for was cut is too plain to admit of controversy.

Mygatt v. Coe, 147 N. Y. 456, 42 N. E. 17;
Rice v. Frayser (C. C.) 24 Fed. 460;
Staton v. Mullis 92 N. C. 623;
Travers v. McElvain, 181 Ill. 382, 387, 55 N. E. 135;
Webber v. Clarke, 74 Cal. 11, 15, 15 Pac. 431;
Omaha & F. L. & T. Co. v. Parker, 33 Neb. 775, 51 N. W. 139, 29 Am. St. Rep. 506;
Gildehaus v. Whiting, 39 Kan. 706, 713, 18 Pac. 916.

The action of trespass quare clausum can be maintained only by one in the actual or constructive possession of the premises on which the trespass is committed.

Gunsolus v. Lormer, 54 Wis. 630,, 633, 12 N. W. 62.

That a cause of action for trespass for injury to the possessory right may be maintained by a person in the actual possession of land against another who holds no paramount right or title, or against a mere intruder, by proving such possession unlawful entry and damage, is well established by the decided cases in this court.

Hungerford v. Redford, 29, Wis. 345, 348;
McNarna v. Ry. Co., 41 Wis. 69, 74;
Gerhardt v. Swaty, 57 Wis. 24, 28, 14 N. W. 851;
Gunsolus v. Lormer, supra.

It is also well settled that a plaintiff in an action quare clausum, who is not in the actual possession of the land upon which the trespass is committed, and who is therefore obliged to rely on constructive possession, must establish that possession by showing that he has good title. Stated in another way, the constructive possession follows the title. In Hungerford v. Redford, supra, the court, after saying that actual possession is sufficient, unless the defendant proves an adverse title of a higher character than a possessory one,
67 continues "If the plaintiff is not the real owner of the land, and the defendants shall be compelled to pay the judgment which he (the plaintiff) recovered against them in the Circuit

Court, what rule of law will prevent such owner from bringing an action against them for the same logs and recovering therein? * * * The fact that a recovery by the holder of a merely colorable title is no bar to a recovery by the real owner demonstrates that none but the real owner can recover." The action was onw of replevin to recover logs wrongfully cut on unoccupied lands claimed by the plaintiff, and recovery was denied, because he was unable to prove perfect title to the lands.

McNarra v. Railway Co., supra, was an action to recover damages occasioned by fire negligently set by the defendant. It was held that the title necessary to be proved in order to maintain the action was the same as in an action of trespass quare clausum fregit, or in replevin for timber cut and removed, and that "in either case," if the lands upon which the trespass was committed were vacant and unoccupied, the plaintiff must prove his title thereto, or he cannot recover."

In Gunsolus v. Lormer, supra, it was said: "That constructive possession which in the absence of any actual possession, will warrant the bringing of this action (trespass quare clausum) is that of the premeise alone."

In Stephenson v. Wilson, 37 Wis. 482, 488, it was hild that, if the plaintiff in an action of trespass quare clausum cannot show actual possession, but is obliged to rely in his legal title, he must show a valid title.

In Wadleigh v. Marathon County Bank, 58 Wis. 546, 17 N. W. 314, the action was brought to recover the value of sawlogs cut upon lands owned by the plaintiff and converted by the defendant to its use. Judgment was demanded for $1,000, being the value of the logs, and for the sum of $1,000 for the damage to the land caused by the cutting of the timber. It was held that the action was in the nature of a trespass and was also brought to recover damages for permanent injury to the freehold. The court said: "Were not damages claimed other than for the mere invasion of the plaintiff's possession, the lands being wild and vacant, it would be incumbent on him to prove his title thereto in order to
68 show a constructive possession in himself. The cause of action being permanent injury to the land to entitle the plaintiff to recover he must establish his title. The reason of this is, if the plaintiff is not the owner of the land, a recovery by him would be no bar to an action for such injury brought against the trespasser by the real owner."

Paige v. Kolman, 93 Wis. 435, 436, 67 N. W. 700, 701, was an action for trespass for cutting timber. The court said: "The land upon which the trespass was committed was unoccupied timber land. Hence the plaintiff must prove valid title in order to recover."

In some of the cases cited the defendants were mere naked trespassers, who acted without any color of right. In all of them the plaintiff showed or attempted to show some color of title. It seems, therefore to be quite well established by our decisions that constructive possession follows the title, and that the trespasser on unoccupied lands can be made to respond in damages but once, and then

to the owner. The decisions elsewhere to the same effect are numerous.

Shipman v. Baxter, 21, Ala. 456;
Smith v. Yell, 8 Ark. (Eng.) 470;
Jenkins v. Lykes, 19 Fla. 148, 45 Am. Rep. 19;
Yahoola River Mining Co. v. Irby, 40 Ga. 479;
Atlantic & G. R. Co. v. Fuller, 48 Ga. 423;
Rockwell v. Jones, 21 Ill. 279;
Gauche v. Mayer, 27 Ill. 134;
Broker v. Scobey, 56 Ind. 588;
Buch v. Aikin, 1 Wend. (N. Y.) 466, 19 Am. Dec. 535;
Roe v. Wilbur, 57 Pa. 406;
Snider v. Myers, 3 W. Va. 195;
Church v. Meeker, 34 Conn. 421;
Edwards v. Noyes, 65 N. Y. 125.

It is now pertinent to consider what interest the plaintiff had acquired in the lands at the time of the trespass. It has been held by this Court and by the federal Supreme Court that an entryman secures no title to the land he desires to homestead until he has complied with the law and has earned his patent.

Empey v. Plugert, 64 Wis. 603, 607, 608, 25 N. W. 560;
Whitcomb v. Provost, 102 Wis. 278, 282, 283, 78 N. W. 432;
Shiver v. United States, 159 U. S. 491, 16 Sup. Ct. 54, 40 L. Ed. 231;
Stone v. U. S., 167 U. S. 178, 17 Sup. Ct. 778, 42 L. Ed. 127.

If the homesteader, before he has earned and received a final receiver's receipt, cuts or removes any more timber from his
69 homestead than is necessary in the process of clearing his farm and fitting it for cultivation, he himself becomes a trespasser and liable to be prosecuted not only civilly, but criminally, for trespass.

Timber Cases (D. C.) 11 Fed. 81;
U. S. vs. Lane (C. C.) 19 Fed. 910;
U. S. vs. Freyberg (C. C.) 32 Fed. 195;
Shiver v. U. S., supra.
Stover v. U. S., supra.

No vested right is conferred on the claimant that may not be taken away by Congress. Frisby v. Whitney, 9 Wall. 187, 193, 19 L. Ed. 668; Yosemite Valley Case, 15 Wall. 77, 88, 21 L. Ed. 82; Shiver v. United States, supra. The homesteader on making his entry acquires an inchoate right to secure the title to the land filed on, on complying with the homestead law, in preference to all other applicants for such land whose claims are subsequent to his. The land thereby becomes segregated and set apart for his benefit, and, in a sense, appropriated for his use.

Shiver v. U. S., supra;
Burlington etc. Ry. Co. v. Johnson, 38 Kan. 142, 16, Pac. 125, 129, and cases cited.

There was a right of action in some one to recover damages for this trespass as soon as it was committed. It is clear that such a right of action was vested in the United States as owner of the land. It also seems clear that under the facts of this case there was but a single cause of action, and that the plaintiff had no title that carried the constructive possession so as to enable him to maintain the action. If there was but a single cause of action, that was extinguished by the settlement made with the only party who was entitled to make it.

The plaintiff, however maintains that the doctrine of relation is applicable to the facts of the case, and that the patent should be held to relate back and convey title as of the date of the homestead filing, and a number of cases are cited in support of such claim. The doctrine of relation is of equitable origin, but has a well recognized application to proceedings at law. It is applied most frequently to conveyances of real estate made in pursuance of an antecedent contract, and is applied to give effect to the intention of the parties or to protect purchasers pending the fulfillment of the contract. It is also applied to public land transactions so as to cut off intervening claimants between the date of the entry and the date of the patent.

Sheply v. Cowan, 91 U. S. 330, 337, 340, 23 L. Ed. 424;
Peyton v. Desmond, 129 Fed. 1, 11. 63 C. C. A. 651.

Our own court has appleid it to land contracts, at least as between parties and privies thereto, in the following cases:

Stahl v. Lynn, 86 Wis. 75, 56 N. W. 188;
Krakow v. Wille, 125 Wis. 284, 103 N. W. 1121;
Evans v. Crawford County Ins. Co., 130 Wis. 189, 109 N. W. 952, 9 L. R. A. (N. S.) 485, 118 Am. St. Rep. 1009;
Western L. & C. Co. v. Copper River L. Co., 138 Wis. 404 120, N. W. 277, and
Blaha v. Borgman, 142 Wis. 43, 124 N. W. 1047.

It has also held that the doctrine would apply as against a trespasser.

Gilbert v. Auster, 135 Wis. 581, 116 N. W. 177.

In Peyton v. Desmond, 129 Fed. 1, 63 C. C. A. 651, it is held that a homesteader after he secures a patent may sue and recover for a trespass committed before final proofs were made; the patent relating back to the date of entry. In this case it is held that the homesteader is entitled to receive the land in the condition in which it was on the date he made the entry. When the patent was issued, however, the timber was gone and a right of action only remained to recover its value. Equitably, as between the United States and the Homesteader, that cause of action became the property of the latter as soon as he complied with the law, and it was held that the patent carried with it the right of action for the trespass. No attempt had been made by the United States to enforce the collection of the trespass. This case, which is strongly relied on by the respon-

dent, is authority to the proposition that the moneys collected by the United States from the defendant equitably and justly belong to the plaintiff, now that he has perfected his title. It is not authority for the claim that the United States did not have the right to collect for the trespass in the first instance, and neither is it authority to the proposition that, although the United States has compromised and settled its cause of action, the same cause of action can be prosecuted by the homesteader against the trespasser. On the contrary, the decision holds that, where the United — has a cause of action at the time the patent is issued, it parts with such cause of action against the trespasser by assigning it in effect to the homesteader.

The case of Carner v. Railway Co., 43, Minn. 375, 45 N. W. 713, relied on by the appellant, is distinguishable from the case at bar in two respects; in the first place, the plaintiff was in the actual possession of the lands under his timber entry when it was damaged by the fire negligently set by the defendant, and, secondly, the United States asserted no claim against the defendant for the damage resulting from the fire. The case of Hastay v. Bonness, 84 Minn. 120, 86 N. W. 896, is also relied upon by the appel-
71 lant. This action was brought by the homesteader after he had secured his patent, and the United States had never attempted to collect for the trespass, and it was held that the patent related back to the date of entry. This case was very similar in its facts to Peyton v. Desmond, supra.

Our attention has not been called to any case which holds that the United States was not entitled to collect for the trespass committed by the defendant at the time when it did collect for the same, and the law seems to be well settled the other way. Neither has our attention been called to any case where the homesteader who has not yet entered into possession of his homestead can maintain an action for trespass committed before he has taken possession, and while his right to the land remains inchoate. This action is brought under section 4269, St. 1898, and that statute only gives a right of action for trespass for timber wrongfully cut "upon the land of the plaintiff." The decisions of our own court hold that constructive possession follows the title in an action of trespass involving injury to the freehold. Finally, we think there was but a single cause of action, which the United States might enforce at any time before a final receiver's receipt of patent was issued, and that when it was enforced and the *and the* damages claimed were paid it became extinguished, and the issuance of a patent could not revive it. The rule requiring a party not in actual possession to show title before he can recover in an action for trespass for injury to real estate is reasonable. Our statute, section 4269, has been held to be highly penal, in that it permits the injured party to recover a sum which may be several times the amount of damage actually sustained. Unless the law clearly permits every person having color of title to sue for and exact damages provided for in the statute, we should be loath to hold that there could be more than one recovery for a single injury to the freehold. Four persons may have a tax deed on a vacant parcel of land on none of which deeds has the three-

year statute limitations run. Any one of the four may eventually acquire title by virtue of his deed and acts done thereunder. The original owner may succeed in setting aside all of the
72 deeds and establish perfect title in himself. We do not think that each of these five parties could sue a trespasser and collect from him the value of the lumber manufactured from logs wrongfully cut from the land, because each could show a colorable title and a better right to the premises than the trespasser. The equitable doctrine of relation cannot be applied simply to compel a wrongdoer to pay twice for the same wrong. If the doctrine of relation has any application in such a case as this, it is between the government and the homesteader, whereby the former when the homestead is patented should be charged as trustee of the latter for the amount collected. It follows that the settlement of the cause of action sued on by the defendant with the United States was a good defense to such action, and that the court erred in awarding judgment in plaintiff's favor.

The judgment of the circuit court is reversed, and the cause is remanded, with directions to dismiss the complaint.

Siebecker, J., took no part. Kerwin, J., dissenting.

73 STATE OF WISCONSIN,
Supreme Court:

I, Clarence Kellogg, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original opinion of the Court by Justice Barnes on file in my office in the above entitled cause, and that it is a correct transcript therefrom, and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Madison, the 17th day of April, A. D. 1911.

CLARENCE KELLOGG,
Clerk of the Supreme Court of Wisconsin.

74 [Endorsed:] State of Wisconsin, Supreme Court. Glenn Knapp, Respondent, vs. Alexander & Edgar Lumber Co., Appellant. Certified copy of opinion of the Court by Justice Barnes. Filed, Office of the Clerk of Circuit Court, Bayfield Co., Wis., April 18, 1911. F. A. Bell, Clerk.

75 STATE OF WISCONSIN,
County of Price, ss:

The Clerk of the Circuit Court in and for the said County of Price, does hereby certify that the annexed Judgment was duly signed and minuted on the 18th day of November, 1911, at a general term of the Circuit Court of the Fifteenth Judicial Circuit, of the State of Wisconsin, begun and held at the Court House in the City of Phillips, within and for the said County of Price, on the 13th day of November, 1911, Hon. John K. Parish, Circuit Judge, presiding, the same being a special term for each county in said

Fifteenth Judicial Circuit. And further, that by order of said Court, whereof said Clerk has made a minute in his Journal it was directed that the said annexed and foregoing Judgment be filed and entered on record in the office of the Clerk of the Circuit Court in and for the County of Bayfield in the said Fifteenth Judicial Circuit.

In testimony whereof, the Clerk of the Circuit Court in and for said County of Price, has hereunto set his hand and affixed the seal of his said Court, at the City of Phillips, Wisconsin this 18th day of November, 1911.

HENRY NIEBAUR, *Clerk.*

Filed, Office of the Clerk of Circuit Court, Bayfield Co., Wis., Dec. 2, 1911. F. A. Bell, Clerk.

76 STATE OF WISCONSIN:

In Circuit Court, Bayfield County.

Filed, Office of the Clerk of Circuit Court, Bayfield Co., Wis., Dec. 2, 1911. F. A. Bell, Clerk.

GLENN KNAPP, Plaintiff,
vs.
ALEXANDER AND EDGAR LUMBER COMPANY, Defendant.

At a regular term of the Circuit Court for Price County, Held at the Court House in the City of Phillips, Price County, Wisconsin, the same being a Special Term for Bayfield County.

Present: Hon. John K. Parish, Judge Presiding.

The judgment for plaintiff herein having been reversed by the Supreme Court upon the appeal of the defendant and the action remanded with direction to render judgment for the defendant, dismissing the complaint upon the merits, and the record having been duly returned to the Court and notice of remittiteur served, and defendant having moved this Court for judgment in accordance with such mandate, and said motion coming on to be heard at this time and place;

Now, on motion of Kreutzer, Bird, Rosenberry & Okoneski, defendant's attorneys,

It is adjudged, that the complaint in this action be, and the same hereby is, dismissed upon the merits and plaintiff take nothing thereby, and that the defendant, Alexander & Edgar Lumber Company, do have and recover of and from the plaintiff, Glenn Knapp, its costs and disbursements, taxed and inserted herein in the sum of — Dollars and — Cents, and that it have execution therefor.

By the Court:

JOHN K. PARISH,
Circuit Judge.

Dated November 18th, A. D. 1911.

77 [Endorsed:] 109–2584. State of Wisconsin. In Circuit Court, Bayfield, County. Glenn Knapp, Plaintiff, vs. Alexander & Edgar Lumber Company, Defendant. Judgment dismissing complaint upon the merits & for costs in favor of the defendant. Original. Filed, Office of the Clerk of Circuit Court, Bayfield Co., Wis., Dec. 2, 1911. F. A. Bell, Clerk. Kreutzer, Bird, Rosenberry & Okonszki, Attorneys at Law, Wausau, Wis.

78 STATE OF WISCONSIN,
County of Bayfield, ss:

I, F. A. Bell, Clerk of the Circuit Court in and for the County of Bayfield, in the State of Wisconsin aforesaid,

Do hereby certify, That the foregoing is a true and correct transcript of the record and of the whole thereof in the case of Glenn Knapp, Plaintiff, vs. Alexander-Edgar Lumber Company, a corporation, Defendant, as the same appears of record and on file in my office in the City of Washburn in the said County of Bayfield in the State of Wisconsin aforesaid.

Witness, my hand, and the seal of the said court, at the City of Washburn in said County, this 17th day of March, A. D. 1913.

[Seal Circuit Court, Bayfield Co., Wisconsin.]

F. A. BELL, *Clerk.*

STATE OF WISCONSIN,
The 15th Judicial Circuit,
County of Bayfield, ss:

I, Gulick N. Risjord, Judge of the Circuit Court, of the Fifteenth Judicial Circuit of said State of Wisconsin, and which said Judicial Circuit includes the County of Bayfield,

Do hereby certify, That F. A. Bell whose signature is annexed to the above certificate, was at the date thereof the clerk of the Circuit Court for Bayfield County aforesaid; that the official acts and doings of said clerk are entitled to full faith and credit, and that the said attestation by said clerk is in due form of law.

Given under my hand and seal this 18th day of March, A. D. 1913.

GULLICK N. RISJORD,
Circuit Judge, Bayfield County, Wis.

79 STATE OF WISCONSIN,
County of Bayfield, ss:

I, F. A. Bell, Clerk of the Circuit Court in and for the County of Bayfield, in the State of Wisconsin aforesaid,

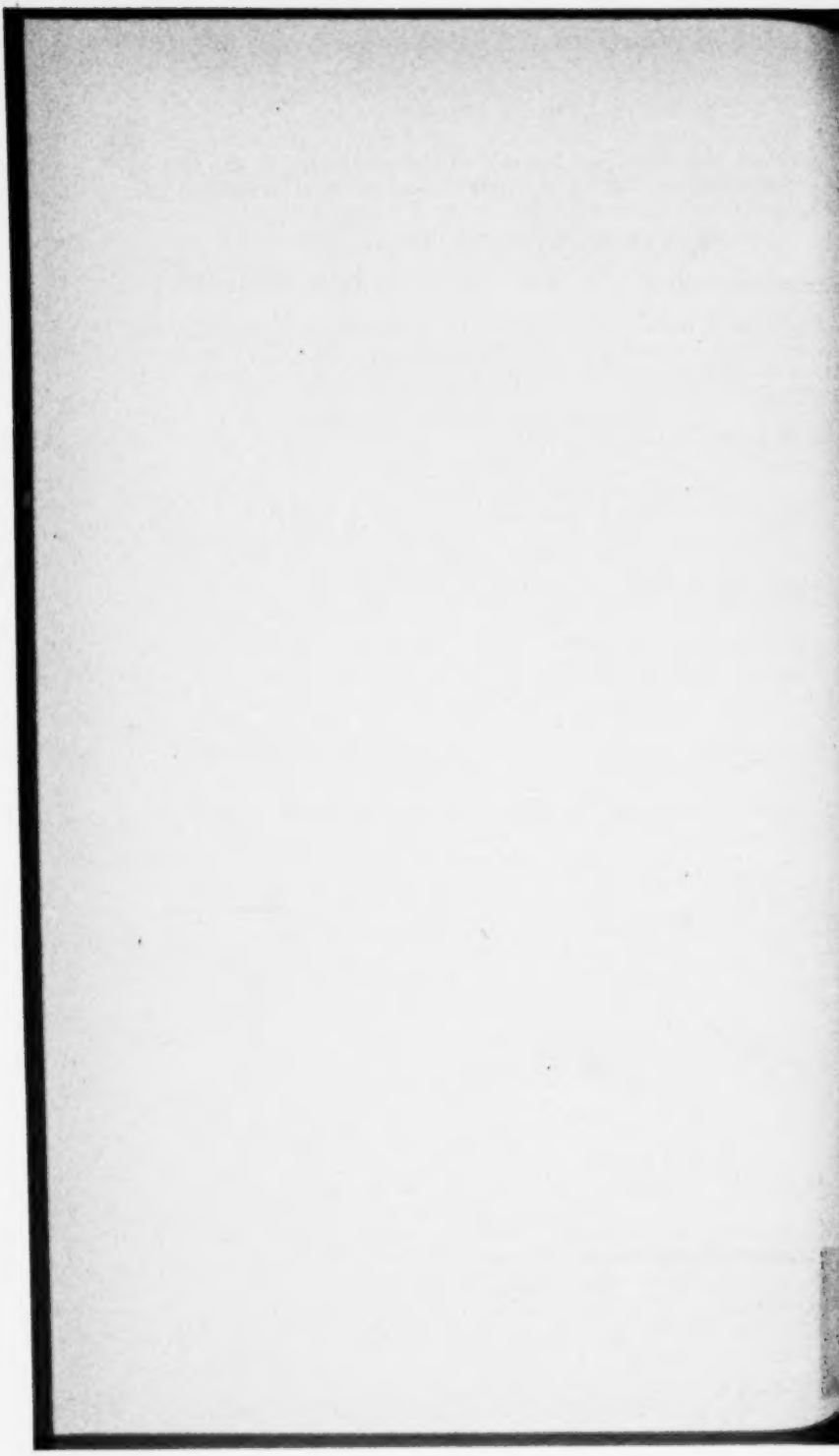
Do hereby certify, That Gulick N. Risjord, whose genuine signature is annexed to the above certificate, was on the date thereof, to wit, the 18th day of March, A. D. 1913, the presiding Judge of the Circuit Court aforesaid, duly commissioned and qualified, and that the acts and doings of said presiding Judge are entitled to full faith and credit.

Witness, my hand, and the seal of the said court, at the City of Washburn in said County of Bayfield, and State of Wisconsin this 21st day of March, A. D. 1913.

[Sear Circuit Court, Bayfield Co., Wisconsin.]

F. A. BELL, *Clerk.*

Endorsed on cover: File No. 23,615. Wisconsin, Bayfield County Circuit Court. Term No. 139. Glenn Knapp, plaintiff in error, vs. Alexander-Edger Lumber Company. Filed April 4th, 1913. File No. 23,615.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

No. 139

GLENN KNAPP, PLAINTIFF IN ERROR,

vs.

ALEXANDER-EDGER LUMBER COMPANY

DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

H. H. GRACE,
GEO. H. HUDNALL,
C. R. FRIDLEY,
Solicitors for Plaintiff in Error

LIST OF CASES

SUBJECT INDEX

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

No. 139

GLENN KNAPP, PLAINTIFF IN ERROR,

vs.

ALEXANDER-EDGER LUMBER COMPANY

DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

Statement of Case.

The plaintiff in error began this action in the Circuit Court for Bayfield County, Wisconsin, to recover of the defendant in error for cutting trees upon his homestead. The Circuit Court gave judgment for the plaintiff but this was reversed in the Supreme Court on the defendant's appeal. The case is now before this court on writ of error.

Complaint.

The complaint alleged that prior to the 21st day of February, 1902 the south one-half of the northeast quarter (S½-NE¼), the southeast quarter of the northwest quarter (SE-NW), and the northeast quarter of the southeast quarer (NE-SE) of section three (3), in township forty-six (46) north of range nine (9) west, Bayfield

County, Wisconsin, was Government land and subject to homestead entry, that on the 21st day of February, 1902, the plaintiff in error entered said described land as a homestead under and pursuant to the laws of the United States; that he made final proof of his homestead entry on the 5th day of August, 1907, and on the 27th day of January, 1908, the United States issued to him a patent, and that ever since the 22nd of January, 1908, he had been, and at the time of the commencement of the action was, the owner in fee of said premises.

That on and between the 21st day of February, 1902, and the 10th day of April, 1902 the defendant in error unlawfully and without authority broke and entered said premises and cut and removed therefrom two hundred seventy-six (276) pine trees of the value of $1000.00, and converted said trees and the logs cut therefrom to its own use, and manufactured the same into lumber, which while in the possession of the defendant in error, was of the value of $2500.00.

Plaintiff in error prayed judgment against the defendant in error for the sum of $2500.00 and the costs, of the action. (Rec. p. 10-11).

Answer.

The defendant in error admitted by its answer that the land described in the complaint was Government land, and subject to homestead entry; that on the dates named in the complaint the plaintiff entered the land as a homestead, made final proof thereon, and received a patent therefor.

It further admitted that between the 21st of February, 1902, and the 10th of April, 1902, it unintentionally and by mistake cut and removed a number of pine trees, but denies that there were two hundred and seventy-six (276), or that they were worth $1000.00, or that they were worth $2500.00 while in the possession of the defendant in error, manufactured.

As a further defense, the defendant in error alleged that while it was so engaged in cutting said timber it was notified by the plaintiff in error, who claimed to own the land, that they were cutting over the line, and that thereupon it immediately ceased cutting on said land; "that thereafter the United States Government, through its duly authorized agents, made a claim against the defendant on account of the value of the timber so cut and removed by the defendant on the lands described in plaintiff's complaint. That thereupon

this defendant and the United States agreed upon the amount of said trespass and the amount that should be paid in full settlement thereof, and that on the 3rd day of June, 1903 this defendant, pursuant to the terms of such settlement, duly paid the United States Government $320.14 in full settlement of the damages claimed by the United States by reason of the cutting and removal of said timber by the defendant on the lands described in the plaintiff's complaint."

That the plaintiff in error did not establish his residence upon the land until the 1st day of August, 1902, and at that time he knew the defendant had cut and removed the timber from the premises and at the time of making final proof and receiving his patent he knew that the defendant had paid the United States the amount of the damages on account of said cutting.

That the patent issued to the plaintiff in error did not convey or assign any right, title or interest in any claim for trespass other than such as might pass by conveyance of the land. (Rec. pp. 13-16).

Findings of Facts.

The Judge of the Circuit Court made and filed findings of fact in which he found that the premises described in the complaint was, on the 20th day of February, 1902, Government land; that on that day the plaintiff made an application at the United States Land Office at Ashland, Wisconsin, to enter said land; that on the 21st day of February, 1902, the Register of the Land Office attached his certificate to said application, and that on said day the Receiver of the Land Office issued a Receiver's receipt therefor.

That on February 10, 1902, the plaintiff in error went upon the land for the purpose of ascertaining the character of the soil and the timber thereon, and intending, if the same were satisfactory, to enter the same as a homestead; that on the 20th day of March, 1902, he again went upon the land to see if any trespass had been committed, and that on the 5th of April, 1902, he again went upon the land temporarily, and found the employees of the defendant in error cutting the timber thereon, and forbade them cutting any more of the timber.

That on July 1, 1902, and within six months after making his homestead entry, the plaintiff in error established his actual residence upon the land, and on August 5, 1907, made final proof, and on January 22, 1908, received his patent, and that ever since the 22nd day of January, 1908, the plaintiff was the owner of said premises in fee.

That on and between the 20th day of March, 1902, and the 7th day of April, 1902, the defendant in error entered upon the land in question and cut and removed therefrom, willfully, unlawfully, and without authority, 49,190 feet of pine timber; that thereafter and prior to the 7th day of July, 1903, a special agent of the United States investigated said trespass, reported the amount thereof to the Secretary of the Interior accompanied by a proposition of settlement submitted by the defendant in error, in the sum of $320.14, accompanied by a certified check of that amount payable to the Commissioner of the General Land Office; that on the 7th day of July, 1903, the Secretary of the Interior accepted the proposition of settlement on the basis of an unintentional trespass; and directed the Commissioner of the General Land Office to take the necessary steps to carry said settlement into effect; that on July 13th, 1913 the commissioner of the General Land Office directed the Receiver of Public Monies of the United States Land Office at Ashland, Wisconsin, to deposit the amount of the certified check $320.14 "in the Treasury of the United States in the same manner as money received from a sale of public lands, but specifying that the same is for depredation upon public timber"; and that in accordance with said directions, said receiver cashed the certified check and deposited the money received therefrom in the Treasury of the United States.

That after the plaintiff in error had received his patent, he demanded from the United States said sum of $320.14, which the United States Government refused to pay.

That the cutting of said timber was not done by mistake and that the defendant in error did not at or before the time of the service of his answer serve on the plaintiff his affidavit that such cutting was done by mistake or offer in writing to allow judgment to be taken against him for any sum whatever, as provided by section 2269 of the Statutes of Wisconsin for 1898.

That the stumpage value of said timber was $5.00 per thousand, and that the highest market price while in the possession of the defendant in error was $12.00 per thousand.

That the timber cut and removed from the land in question and for which the Government received $320.14, was the same timber for the value of which the plaintiff brought this action. (Rec. pp. 19-26).

Conclusions of Law and Judgment.

As conclusions of law, the trial court found that the payment

by the defendant in error to the Receiver of the Public Monies at Ashland, Wisconsin, was void as against the plaintiff in error, and did not as against him amount to a settlement for the unlawful cutting and removal of the timber from the land in question; that the plaintiff in error is entitled to recover $12.00 per thousand for the timber cut and removed. (Rec. p. 26).

Judgment was thereupon entered for $714.87. (Rec. pp. 27-28).

Appeal.

The defendant in the error thereupon appealed to the Supreme Court of the State of Wisconsin. (Rec. p. 28).

The Supreme Court reversed the judgment of the Circuit Court and demanded the action with directions to dismiss the complaint. Justice Kerwin dissenting and Justice Siebecker taking no part. (Rec. p. 31).

The Supreme Court by its opinion held that the plaintiff in error at the time the trespass was committed was not in the actual possession of the land; that in order to maintain trespass quare clausum the plaintiff must be in the actual or constructive possession of the premises; that where constructive possession is relied upon it must be established by showing perfect title; that a trespasser on unocupied land can be made to respond in damages but once, and then to the owner; that at the time of the trespass the title of the land was in the United States in whom was vested the right of action for the trespass; that the plaintiff had no title that carried constructive possession so as to enable him to maintain the action; that the cause of action was extinguished by the settlement made with the United States and the patent could not revive it; that the doctrine of relation had no application as between the trespasser and the homesteader; that if the doctrine of relation had any application it was between the government and the homesteader whereby the government should be charged as trustee of the plaintiff for the amount collected. (Rec. pp. 32-38).

Judgement on Remittitur.

Thereafter final judgement was entered in the Circuit Court for Bayfield County dismissing the complaint upon the merits and for costs. (Rec. p. 39).

This final judgement is brought to this court by writ of error. (Rec. pp. 1-10).

Specification of Errors Relied Upon.

1. The Supreme Court of the State of Wisconsin erred in holding that one who had made an application to enter government land as a homestead and had received from the land office a Receiver's Receipt and paid the fee and who had gone upon the land for the purpose of ascertaining the character of the soil and the timber thereon, and to ascertain if any trespass had been committed thereon, but who had not established his actual residence in a house upon the land, could not, after he had established his actual residence upon the land in accordance with the laws of the United States and continuously resided thereon for the term of five years as provided by the laws of the United States and made his final proof and received his Receiver's final receipt and patent, maintain an action of trespass against a mere intruder who had gone upon the land between the date of the entry and the date of the establishing of actual residence and cut and removed timber therefrom.

2. That the Supreme Court of the State of Wisconsin, erred in holding that one who had entered government land, paid the fee, received the Receiver's final receipt, established his actual residence upon land within six months after making the entry and had resided upon and had cultivated the land continuously for five years, made his final proof, received a Receiver's final receipt and received his patent, was not in the constructive possession of the premises between the time of making his entry and establishing his actual residence.

3. That the Supreme Court of the State of Wisconsin, erred in holding that an entryman, circumstances as stated in the first and second assignment of errors, secures no title to the land he desires for a homestead until he had complied with the law and earned his patent.

4. That the Supreme Court of the State of Wisconsin erred in holding that the right of action for a trespass, such as set forth in the first assignment of error, was vested in the United States as the owner of the land.

5. That the Supreme Court of the State of Wisconsin erred, in holding that there was but a single cause of action for a trespass, such

as set forth in the first assignement of error, and that such action could not be maintained by the homesteader even after he had obtained his patent.

6. That the Supreme Court of the State of Wisconsin erred in holding that the United States could, prior to the issuing of the patent, settle with the trespasser for a trespass such as is set forth in the first assignment of error.

7. That the Supreme Court of the State of Wisconsin erred in holding that a trespasser such as set forth in the first assignment of error herein, after the trespass had been investigated and reported to the Secretary of the Interior as an unintentional one, could extinguish the cause of action for the trespass by submitting a proposition of settlement to the Secretary of the Interior and paying to the United States, with the approval of the Secretary of the Interior, the stumpage value of the trespass.

8. That the Supreme Court of the State of Wisconsin erred in holding that a patent issued as state in the first assignment of error did not relate back and convey the title as of the date of the homestead entry so as to vest in the entryman the cause of action for a trespass such as stated in the first assignment of error.

9. That the Supreme Court of the State of Wisconsin erred in holding that the United States after issuing a patent should be charged as trustee for the entryman for the amount collected by it for the trespass such as is set forth in the first assignment of error.

10. That the Supreme Court of Wisconsin erred in setting aside the judgment of the Circuit Court and remanding the case with direction to dismiss the complaint.

11. That the Circuit Court of Bayfield County, Wisconsin, erred in entering final judgment herein in compliance with the judgment of the Supreme Court of the State of Wisconsin, dismissing the complaint and adjudging that the plaintiff taffe nothing in this action.

ARGUMENT.

There was no bill of exceptions in the Supreme Court of Wisconsin, the defendant in error here, being the appellant in the state court, resting its claim on the proposition that the judgment of the Circuit Court was not supported by the pleadings and the findings.

In Wisconsin the Supreme Court will in the absence of a bill of ex-

ceptions, examine the record to ascertain if the judgment is supported by the pleadings and findings.

Blossom vs. Ferguson, 13 Wis. 75.

Wolfe vs. Furman, 142 Wis. 94.

It is admitted by the defendant in error, and the Supreme Court of Wisconsin held, that if the plaintiff in error was in either the actual or constructive possession of the premises at the time the trespass was committed he could maintain his action.

Actual Possession.

We claim that the plaintiff in error had sufficient actual posession of the homestead to maintain an action of trespass against a wrongdoer.

The answer of the defendant in error admits that while it was in the act of cutting the timber it was notified by the plaintiff in error that he claimed to own the land, and that the defendant in error was trespassing thereon, and that thereupon it, the defendant in error, immediately ceased cutting. (Rec. p. 15). The trial court found

"That on February 10, 1902, the plaintiff went upon the land for the purpose of ascertaining the character of the soil and the timber thereon, intending, if the same were satisfactory, to enter the same as a homestead. On March 20, 1902, the plaintiff went upon the land in question to see if any trespass had been committed thereon; that on April 5, 1902, the plaintiff again went upon the land in question, temporarily, and found the employees of the defendant cutting the timber thereon, and forbade them cutting any more of the timber." (Rec. p. 23).

The plaintiff in error made his homestead entry on February 21, 1902.

Do these facts show a sufficient possession in the plaintiff in error to enable him to maintain trespass against a mere intruder.

We claim they do.

The Supreme Court of Wisconsin decided they did not, and cited several cases to sustain its holding. (Rec. p. 33). All of the cases cited arose between parties, both of whom claimed title, and the question in each case was, What is sufficient adverse possession to

divest title. None of the cases cited are authority for what it sufficient possession against a mere intruder without claim of title.

There is a vast difference in the character of the possession which is sufficient as against a mere trespasser, and that which is sufficient to give title as against the true owner.

The Supreme Court of Wisconsin in Gerhardt vs. Swaty, 57 Wis. 24, recognized this distinction, and say:

"Whether this proof (parol evidence of title) would be sufficient to show an adverse possession of the four forties under the provision of Subd. 4 of sec. 4212 R. S., 1878 (the adverse possession statute) against the true owner, need not be decided, as we think a more liberal rule should be and is adopted against a mere trespasser claiming no title or right to the premises."

In Rogan vs. Perry, 6 Wis. 194, the same court held that where the plaintiff had cut cordwood from trees growing on vacant and unenclosed land, he had shown sufficient possession, without proving any title to the land or the wood, to enable him to maintain trespass against a mere wrongdoer who took and carried away the wood.

It was held in New Hampshire that one who entered upon land with a view of taking possession of it under claim of title and marked the lines had sufficient possession as against a trespasser.

Woods vs. Banks, 14 N. H. 101.

Where the locator of a mineral claim began an action of trespass for cutting timber on the claim before patent issued, and the defendants contended that "the plaintiffs were bound to prove themselves in actual possession," the Supreme Court of Colorado say:

"To maintain an action for injury to a mining claim, it is not necessary that the claimant should reside on the premises, nor that it should be inclosed or cultivated, nor that he should have a *pedis possessio* of the claim, according to the common acceptation of that term. Having made and marked the discovery, and filed his certificate, having performed and kept up the work necessary to perfect his claim, and having otherwise complied in good faith with the requirements essential to a valid and subsisting location, and being in the actual and lawful control of the claim for the purpose of working or developing the same, he is, while continuing such relations to the property, entitled to the exclusive possession and enjoyment thereof against the whole world. Under such circumstances, his possession must be con-

sidered sufficient to enable him to maintain an action against any one trespassing thereon."

McFeters vs. Pierson, 24 Pac. Rep. 1076.

In an action of ejectment for a mining claim, the Supreme Court of Colorado say:

"The right to mineral lands, before a patent issues from the government, rests in possession of the claimant. To constitute such possession as will give this right under location statute, neither residence on the premises, nor continuous actual occupation, nor that kind of possession for which appellants' counsel contend, denominated *possessio pedis*, is required."

Strepy vs. Stark, 5 Pac. Rep. 111-116.

A homesteader has six months after making his entry within which to establish his actual residence in a house upon the land.

Circular, General Land Office 1899, page 14.

This the plaintiff in error did, and in all other respects complied with the Homestead Statute, and prior to the commencement of this action received his patent. Having done this, and in addition thereto, having gone upon the land before he made his entry for the purpose of ascertaining the character of the soil and the timber thereon, and, after having made his entry, and prior to the time when he established his actual residence in a house upon the land, having gone upon the land twice to see if trespass had been committed, and the last time, April 5, 1902, having found the employees of the defendant in error cutting the timber, he informed them that he was the owner of the land, and forbid them cutting any more timber,, we submit is a sufficient possession to maintain trespass against the defendant in error, who was a mere intruder upon the premises without any claim of right.

We, therefore, submit that our first assignment of error is well taken, and that the Supreme Court of Wisconsin was in error in holding that the plaintiff in error was not in actual possession, and, therefore could not maintain the action.

Constructive Possession.

If this court should hold that the plaintiff in error was not in

sufficient actual possession of the homestead as against a mere trespasser, then we contend he could maintain this action, because he was in the constructive possession of the homestead.

To determine whether or not he was in the constructive possession it is necessary to examine the authorities as to the rights of a homesteader after entry and before patent issues.

"Under the rulings of the Land Department of the Government, a valid homestead entry operates as an appropriation and reservation of the land embraced in the same, so long as it remains in force and uncanceled. The entry while in force segregates the tract from the mass of the public domain."

Burlington K. & S. W. R. Co. vs. Johnson, 16 Pac. Rep. 125-129 and cases cited.

By his entry the homesteader obtains a "conditional or inchoate right to the land which was capable of perfection through compliance with the homestead law."

"This conditional or inchoate right included an exclusive right to the possession so long as the plaintiff (homesteader) should comply in good faith with the requirements of the law controlling homestead claims and include a further right to earn and receive the title. This right to the possession and to earn and receive the title extended to everything which was part of the land—timber as well as soil. The severance of the timber from the soil was a violation or infraction of the plaintiff's right to the possession and of his right to earn and receive the title."

The homesteader is "entitled upon perfecting his homestead claim, to receive a conveyance of the land in the condition in which it was when his claim was initiated."

"It was the intention of the government, by the homestead law, and was the intention of the plaintiff (homesteader), in accepting the provisions of that law, that, upon his compliance with its requirements, he should be entitled to the land, with whatever advantages were incident to its natural condition and character, whether due to the fertility of its soil, or to its growth of timber."

"It does not comport with the spirit of the homestead law to say that, after the initiation and partial perfection of a homestead claim, some third person may rob the land of a substantial part of that which gives it value, and that, on full compliance with the law by the homestead claimant, the government may convey to him that which is left of the land, and may recover from the wrongdoer, and retain to its own use, the value of that which has been unlawfully taken from the land through no fault or wrongful act of the homestead claimant. The law does not contemplate anything so unreasonable."

Peyton vs. Desmond, 129 Fed. Rep. 1.

"His (the homesteader's) settlement protects him from intrusio or purchase by others, but confers no right against the government.

"The right which is given to a person or corporation by a reser vation of public lands in his favor, is intended to protect him agains the actions of third parties, as to whom his right to the same may b absolute. But, as to the government, his right is only conditional an inchoate."

Shiver vs. United States, 159 U. S. 493.

"He (the entryman) could have maintained an action of trove for any timber cut from the land by a stranger between the time o making of the contract (entry) and obtaining the title.

Teller vs. United States, 117 Fed. 577.

"The effect of the whole transaction between Green (the home steader) and the United States is to establish the right of the forme to the land and the timber thereon from the time of the entry in th land office."

United States vs. Ball, 31 Fed. 667.

"Upon making and filing this affidavit (homestead entry) and th payment of a certain small sum proportionate to the amount of lan applied for, the entryman acquires certain rights in the land and th timber growing thereon. He acquires a privilege or pre-emption, an is clothed with the right and power to protect his entry from intru sion or trespass; while against the government he perhaps acquire no vested interest in the land allotted him, against all else he ac quires the right to an absolute and undisturbed possession and contr which upon compliance with other provisions of the homestead la as to occupancy, cultivation and non-alienation may eventually ripe into ownership. Prior to the time at which by issuance of patei he acquires indefeasable title to the land constituting his entry, h interest in the standing timber thereon to a certain degree is limite and the government forbids the commission of waste and may, unde Sec. 2461, R. S., U. S. prosecute him criminally for the cutting an removal of trees therefrom unless for certain recognized and nece sary purposes."

Orrell vs. Bay Mfg. Co., 36 So. Rep. 561 (Miss.)

"The patent did not give the plaintiff her cause of action (to r cover for timber cut and removed from the land after the filing o the application and prior to the issuance of the patent,) but rather th application of the plaintiff at the land office before such patent ha ripened into a complete title through the recognition by the governmer by issuing the patent. While the plaintiff did not acquire full title t the land through her application, yet, if the same was valid an

authorized by law, it entitled her to an inchoate interest therein and a right of possession as against trespassers."

"By virtue of the acts of Congress under which her rights were acquired, she was entitled, as against wrongdoers, to the possession of the land, and the issuance of the patent recognized such rights. When it was issued it related back to the date of the application."

Hasty vs. Bonness, 86 N. W. Rep. 896 (Minn.)

Where land has been entered, but no patent had been issued, it was held that

"The complainant has an equity in the land in controversy which may ripen into a perfect legal title, and is entitled to the interposition of a court of equity to protect that right as against trespassers who confessedly threatened to enter thereon and to despoil the property of its chief, if not of its only value"—oil.

Olive L. & D. Co. vs. Olmstead, 103 Fed. 568-579.

"It is claimed, however, that an entry under the homestead law gives the settler no vested rights in the land until the issue of the patent. To this we cannot assent. * * * A homesteader, after entry, occupies an entirely different position. He has in fact purchased. His entry, which is made by making and filing an affidavit and paying the sum required by law, is a contract of purchase, which gives him an inchoate title to the land, which is property. This is a substantial and vested right which can only be defeated by his failure to perform the conditions annexed. It is true, no certificate or patent can be issued until the expiration of five years from the date of the entry; the United States retaining the legal title to insure performance of these conditions. But the vested right of the settler attached to the land at the time of his entry, and is liable to be defeated only by his own failure to comply with the requirements of the law. If he complies with these conditions, he becomes invested with full ownership and the absolute right to a patent, which, when issued, relates back to the time of the entry. * * * Until forfeited by his own failure to perform the conditions of his purchase, this right of property acquired by his entry must prevail, not only against individuals, but against the government itself. This is the view expressed in an opinion of the attorney general of the United States, addressed to the secretary of war in July, 1881. See 2 Copp. Pub. Land L. 387."

Red River & L. of W. Ry. Co. vs. Sture, 20 N. W. 229 (Minn.)

Where a locator on a mining claim sued in trespass for cutting timber before the issuing of a patent, and the defendants claimed:

"That the locator of an unpatented mining-lode claim upon the

public domain, not being in actual possession, * * * cannot maintain an action for cutting timber on such claim; that, before the issuance of the patent, the title to the soil and the timber thereon is in the United States; and that the United States alone has the right of action for the cutting and carrying away of such timber," the Supreme Court of Colorado after citing the statutes and authorities as to the rights of a locator on a mining claim, which are no greater than the rights of a homesteader, say:

"Thus, it appears that a mining claim on the public domain is real property and the subject of complete ownership as a claim, and that the locator thereof, or his successor in interest, having fully complied with the terms prescribed by Congress for acquiring title to mineral lands is, so long as he continues such compliance; the owner of the claim for all practical purposes. He is the owner before as well as after the issuance of the government patent, and is entitled to the exclusive possession and enjoyment against every one, including the United States itself."

McFeters vs. Pierson, 24 Pac. Rep. 1076.

While the title of government land is in the United States until patent issues, yet, under the foregoing authorities, after entry, the United States has merely the naked legal tiitle; the right of possession, the beneficial interest, and all other rights of ownership is vested in the homestead, except, that, by statute section 2461, R. S., U. S., he cannot cut the timber unless it is for the purpose of improving the land.

The government, however, has no cause of action against him, after it issues a patent to him, for timber he cut and removed from the homestead after entry and prior to the issuing of the patent.

United States vs. Ball, 31 Fed. 667.

United States vs. Freyberg, 32 Fed. 195.

United States vs. Ellis, 122 Fed. 1016.

It is not the holder of the naked legal title who has the right to maintain trespass. The Supreme Court of Wisconsin in Northrup vs. Trask, 39 Wis. 515, held that if trespass is committed, the person holding the equitable estate under a land contract, and not the owner of the legal title, could maintain the action. The same court in Martin vs. Scofield, 41 Wis. 167, held that the owner of the equitable estate, and not the holder of the legal title, could maintain trover for timber cut from the land by a trespasser and sold to the defendant. Again, in Krakow vs. Wille, 125 Wis. 284, it was held that

the owner of the equitable title could maintain trespass against the owner of the legal title for cutting and removing trees from the premises.

The rule is thus stated in 38 Cyc. 1025, and illustrated by numerous cases cited in note 4, "A right less than full legal title is sufficient to maintain trespass if it is a right in rem in the land, giving right of possession."

We admit that mere color of title does not vest constructive possession in the holder thereof so that he may maintain trespass, (38 Cyc. 1025) but we confidently assert that a homesteader holds far more than a colorable title, and, under the authorities, sufficient title to carry constructive possession.

His rights in the homestead are fixed when he makes his entry and not when he takes up his actual residence upon the land; his rights are precisely the same during the first six months after his entry as during any period up to the time he makes final proof.

He has the exclusive right to the possession even against the government itself. Any invasion of that right gives him a cause of action against the invader and it ought to be immaterial whether he is in either the actual or constructive possession. His right to the possession ought to be sufficient.

After entry, he has a "conditional or inchoate right to the land," and "The severances of the timber from the soil was a violation or infraction of his right to the possession and of his right to earn and receive the title". Desmond vs. Peyton supra., Hasty vs. Bonness supra, he "has an equity in the land", Olive L & D. Co. vs. Olmstead supra; he "acquires certain rights in the land and the timber growing thereon. He is clothed with the right and power to protect his entry from intruders or trespassers", Orrell vs. Bay Mfg. Co. supra; "he is the owner of the claim for all practical purposes", McFeters vs. Pierson supra; "His entry is a contract of purchase", Red River & L. W. Ry. Co. vs Sture, supra; "His settlement protects him from intrusion by others", as to third parties, his rights are absolute, he "has the right to treat the land as his own"; Shiver vs. United States supra. We have not overlooked the fact that in this last case the court say "with respect to the standing timber, his (the homesteader's) privileges are analogous to those of a tenant for life or years". This was said, however, in discussing whether the cutting of the timber by the homesteader amounted to waste, and the language is not authority for saying the analogy holds good in any other particular. But if the relation of the homesteader and the govern-

ment is analogous to that of a tenant for life or for years and mainderman, then, if the homesteader is in possession, he could n tain trespass *quere clausum fregit* for the injury to the posse and the government could maintain trespass on the case for th jury to the freehold, as will be seen from the authorities herein cited. If the homesteader is not in possession he could mai ejectment.

Whitney vs. Allaire, 1 N. Y. 305.

We, therefore, submit that our second, third and fourth as ments of error are well taken, and that the Supreme Court of consin was in error in holding that the plaintiff in error was n constructive possession, and, therefore, could not maintain thi tion.

Settlement.

Did the payment of $320.14 by the defendant in error, a forth in the 12th finding of fact, (Rec. pp. 24 and 25) extin the cause of action arising out of the trespass so as to bar covery therefore by the plaintiff in error?

We claim not, for several reasons: (1). The money wa paid by the defendant in error or accepted by the government settlement for any *civil* liabality growing out of the trespass; The right of action not being in the government, if there is bu civil right of action, it could not make a settlement thereof; (3) there were two civil causes of action, one in favor of the go ment, and the other in favor of the homesteader, a settlement o former, would not extinguish the latter.

The government did not settle, or attempt to settle, the civi bility growing out of the trespass.

When the trespass was committed at least two causes of a arose therefrom, one civil, and the other criminal. Under se 2461 R. S. U. S., the defendant in error was subject to "pay a not less than triple the value of the timber or trees cut, dest or removed", and to imprisonment not exceeding twelve months.

Section 2463 R. S. U. S., provides for the prosecution of persons known to be guilty of depredation * * * on the p lands" and that "all monies * * * collected from depredations the public lands shall be covered into the treasury of the U States as other monies received from the sale of public lands."

The word "depredation" is here used in a criminal statute, and in reference to a criminal liability for trespass upon government lands. It is very significant that the letter from the Commissioner of the General Land Office to the Receiver of Public Monies at Ashland, (Rec. pp 24 and 25) is in the exact language of this criminal statute. It is very evident that the government in accepting the offer of settlement was settling the criminal liability of the defendant in error and not the civil liability. Can it be said that the government knew of this trespass and yet allowed the trespasser to escape the punishment provided by section 2461? It will be noted that this section makes all cutting of timber on lands of the United States, whether willful or unintentional, a crime. It will, therefore, not avail the defendant in error to say that the special agent found this trespass was an unintentional one, except it may account for the smallness of the fine. The defendant being a corporation was no of course, subject to imprisonment.

The government had the clear legal right to settle the criminal liability and its right to settle the civil liability was extremely doubtful, if its existed at all. Therefore, it will be presumed that the government settled the liability which it had the clear legal right to settle, rather than the one, the right to settle which was doubtful or did not exist. It certainly did not settle both.

These two liabilities are independent of each other, and the prosecution or settlement of one does not relieve the trespasser from liability for the other.

Stone vs. United States, 167 U. S. 178.

United States vs. Scott, 39 Fed. 900.

If there was but one civil cause of action arising out of the trespass, as the Supreme Court of Wisconsin held, and that cause of action was not in the government, it could not, of course, make a binding settlement thereof.

If, therefore, the plaintiff in error was in either the actual or constructive possession of the premises at the time the trespass was committed, then of course, any payment to the government by the defendant in error did not extinguish his (the plaintiff's) cause of action to recover for the trespass.

If the plaintiff in error was in neither the actual nor constructive possession at the time the trespass was committed, yet the had filed his homestead entry and the government could neither cut

the timber itself nor give the defendant in error any right or authority so to do. By what rule of law, therefore, does a cause of action arise in favor of the government when the timber was cut by the defendant in error? None.

If, contrary to the holding of the Supreme Court of Wisconsin, there were two civil causes of action for the trespass, one in favor of the government and one in favor of the homesteader, then any settlement made with the government would not extinguish the cause of action in favor of the homesteader.

Whether there were two civil causes of action or only one depends on the relations existing between the homesteader and the government. If that relation is analogous to that of vendor and purchaser then there was but one cause of action, and that in favor of the homesteader. Northrup vs. Trask, supra; Martin vs. Scofield, supra, and Krakow vs. Wille supra. On the other hand, if the relation is analogous to that of tenant for life or years and remainderman, then there were two causes of action, one trespass quere *clausum fregit* in favor of the homesteader for injury to his possessory right, and one, trespass on the case, in favor of the government for injury to the freehold.

18 Am. & Eng. Enc. of Law, 450-453.

A homesteader under all the authorities, has the exclusive right to the possession and that right is invaded when one trespasses upon his homestead, whether he (the homesteader) is in actual possession or not.

That there were two civil causes of action arising out of this trespass is apparent from the letter of Fred Dinnett, Assistant Commissioner of the General Land Office.

As attorneys for the plaintiff in error, we wrote the Commissioner, saying, after reciting the facts, "We do not know your rulings in matters of this kind, but it strikes us that the money paid by the Alexander-Edgar Lumber Company for the trespass committed by them should, upon the issuing of the patent, be paid over to the patentee, Glenn Knapp". Mr. Dinnett replied that "Mr. Knapp, the entryman in this case, and your client, might have obtained protection against trespassers in violation of his right of exclusive possession by seasonable appeal to the courts of law of the State of Wisconsin, there being no reason to doubt that an entryman of public lands can maintain an action of trespass for such an injury as is involved in an unlicensed intrusion upon his possession. On the other

nd, the United States as the owner of both the legal and equitable e prior to performance of conditions imposed by the law, was in- ed by the same trespass, and was entitled to proceed in trover and nversion for the recovery of the value of the timber taken through h trespass, notwithstanding the existance of a different right of ion in the entryman".

The defendant in error contended before the Supreme Court of isconsin, that Glenn Knapp, having demanded of the United States vernment the amount received by it on account of the trespass, reby consented to and approved the settlement, and cited the case United States vs. Anderson, 194 U. S. 394.

The only evidence of demand or consent are the two letters last ve referred to.

This case is wholly unlike the case of United States vs. Ander- , supra. In that action "The United States brought a suit to over from the persons who had thus trespassed upon the land for value of the product by them removed. The owners of the land pursuance of the selections asserted a claim to the benefit of the overy which might be made, *but assented to a compromise made the United States with the trespassers* by which fifteen thousand lars was paid to the United States as the value of the material en from the land. The owners of the land at the time of the com- mise protested that they alone were entitled to receive the sum d to the United States and reserved their right to recover the same m the United States". This case when rightly considered is an hority in favor of the plaintiff in error.

We, therefore, submit that our 5th, 6th and 7th assignments of or are well taken, and that the Supreme Court of Wisconsin was error in holding that the plaintiff's cause was extinguished by a lement between the defendant in error and the government.

Relation.

A patent when issued carries an estate in fee simple, and all the ht, title and interest which the United States had in the land at time the entry was made; the patent when issued relates back the date of the entry and gives the patentee the right to maintain action for tresspass for any timber cut and removed from the land r entry and before patent.

Gilbert vs. Auster, 135 Wis. 581.

Peyton vs. Desmond, 129 Fed. 1.

Shepley vs. Cowan, 91 U. S. 330.

Musser vs. McRae, 46 N. W. Rep. 673.

Hasty vs. Bonness, 86 N. W. Rep. 896.

Heath vs. Ross, 12 Johns. 140.

We, therefore, submit that our 8th and 9th assignments of error are well taken, and that the Supreme Court of Wisconsin was in error in holding that if the doctrine of relation had any application it was between the government and the homesteader, and charged the government as trustee with the $320.14 collected on account of the trespass.

Measure of Damages.

The statute of Wisconsin, section 4269, provides that "In all actions to recover the possession or value of logs, timber or lumber wrongfully cut upon the land of the plaintiff, or to recover damages for such trespass, the highest market value of such logs, timber or lumber in whatsoever place, shape or condition manufactured or unmanufactured, the same shall have been at any time before the trial while in the possession of the trespasser or any purchaser from him with notice, shall be found or awarded to the plaintiff if he succeed except as in this section provided. The defendant in any such action may at or before the time of the service of his answer serve on the plaintiff his affidavit that such cutting was done by mistake, and therewith an offer in writing to allow judgment to be taken against him for the sum therein specified with costs. If the plaintiff accept the offer and give notice thereof in writing within ten days, he may file the summons and complaint and offer with an affidavit of service of the notice of acceptance, and the clerk must thereupon enter judgment accordingly, which shall be in full satisfaction of the matters alleged in the complaint. If notice of acceptance be not so given, the affidavit of the defendant shall be deemed traversed. Upon the trial the jury shall find specialty upon such issue and also the true value of such logs, timber or lumber when so cut as well as their highest market value aforesaid."

The defendant in error herein did not file an affidavit that the cutting was done by mistake, as provided in the foregoing section, and the court so found. (Rec. p. 25). The court also found that the stumpage value was $5.00 per thousand, and the highest market value $12.00 per thousand (Rec. p. 26). The court further found that the cutting was done "willfully, unlawfully, and without authority" (Rec. p. 24), which, of course excludes the ideas that it was done

mistake, and therefore found as a matter of law that the plaintiff entitled to recover $12.00 per thousand (Rec. p. 26).

The Supreme Court of Wisconsin in its opinion says that "This on is brought under section 4269, statutes 1898, and that statute gives a right of action for trespass for timber wrongfully cut *n the land of the plaintiff*". It will be noted, however, that the t does not base its opinion upon the fact that the land upon which tiespass was committed was not "the land of the plaintiff" within meaning of this section. Such a holding would be absurd in view ection 4971, Wisconsin Statutes. That section provides that "In construction of the statutes of this state the following rules shall bserved * * * (9). The word land * * * shall be con-ed to include lands, tenements and hereditaments, and all rights to or interests therein."

Moreover the Supreme Court of Wisconsin has held that one maintain an action under section 4269 if he has an interest in and although he may not be the owner thereof.

Schweitzer vs. Connor, 57 Wis. 177.

Kneeland-McLurg L. Co. vs. Lillie, 156 Wis. 428 and cases cited.

Section 4269 Wisconsin Statutes did not create a cause of ac- it simply changed the rule of damages.

Webster vs. Moe, 35 Wis. 75.

If, however, the plaintiff in error was not entitled to the highest et value of the timber cut, under section 4269, he was, neverthe- entitled to the stumpage value, which the court found to be $5.00 housand (R. p. 26), and therefore the Supreme Court of Wis-n, instead of reversing the judgment of the Circuit Court with ions to dismiss the complaint, (R. p. 38), should have remanded se with directions to enter judgment for $245.95, the stumpage of the timber.

Counsel for the defendant in error in their brief in the Supreme of Wisconsin claim that the trial court was in error in allowing st upon the highest market value of the timber, and cited Smith organ, 73 Wis. 375, and Everett vs. Gores, 92 Wis. 527.

t was stipulated orally in the trial court, as we understood it, n case the plaintiff was entitled to recover he should have inter-

est at six per cent. from the date of the patent, January 22, 190
Counsel for the defendant in error, in their brief claim they unde
stood the stipulation to be to the effect that the plaintiff in error
right of action, if any existed, became complete at that date.

No motion was made in the trial court on account of any err
in including interest in the judgment, and, therefore, under the pra
tice in Wisconsin, the judgment would not have been reversed on th
account, but the amount of interest $50.66 (Rec. pp. 27-28), deducte
from the judgment.

We therefore respectfully submit that the judgment of the S
preme Court of the State of Wisconsin should be reversed and t
case remanded to the Circuit Court of Bayfield County, Wisconsi
with direction to enter judgment in favor of the plaintiff in error a
against the defendant in error.

H. H. GRACE,
GEO. B. HUDNALL,
C. R. FRIDLEY,
Solicitors for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 139

GLENN KNAFF, PLAINTIFF IN ERROR

vs.

ALEXANDER EDGER LUMBER COMPANY,
DEFENDANT IN ERROR

BRIEF OF DEFENDANT IN ERROR.

A. L. KREUTZER,
C. B. BIRD,
M. B. ROSENBERRY,
J. J. OKONESKI,
Solicitors for defendant in error.

SUBJECT INDEX

LIST OF CASES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

No. 139

GLENN KNAPP, PLAINTIFF IN ERROR

vs.

ALEXANDER-EDGER LUMBER COMPANY,
DEFENDANT IN ERROR

BRIEF OF DEFENDANT IN ERROR.

Statement of Case.

The above entitled action was begun in the Circuit Court of Bayfield County, Wisconsin, by the plaintiff in error to recover for damages claimed to have been caused by the defendant in error having cut and removed timber from the lands described after the plaintiff in error had entered the same as a homestead and before he gone into possession thereof. The Circuit Court of Bayfield County, Wisconsin, gave judgment for the plaintiff. The case was removed by the defendant in error to the Supreme Court of the State of Wisconsin by appeal, and the judgment of the trial court was reversed and the cause was remanded to the Circuit Court of Bayfield County, Wisconsin, with directions to enter judgment in favor of the defendant there, the defendant in error here, dismissing the plaintiff's complaint. The case is now here upon a writ of error of the

Circuit Court of Bayfield County, Wisconsin, and this is a brief for the defendant in error upon such hearing.

Position of Defendant in Error.

The defendant in error contends upon this hearing that the judgment of the Supreme Court of the State of Wisconsin should be affirmed for two reasons:

1. That upon this hearing the Supreme Court of the United States has no jurisdiction to reverse the determination of the Supreme Court of the State of Wisconsin upon this record for the reason that no federal question is involved.

2. That the judgment of the Supreme Court of the State of Wisconsin is right upon the merits of the case.

No Federal Question Involved.

We take it that the right of the plaintiff in error to remove this cause to this Court is based upon the provisions of section 709 Revised Statutes of the United States, which is as follows:

"Sec. 709. A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit should be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, or where any title, right, privilege, or immunity is clamed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ of error shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States;

The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ."

We call attention to the fact that neither in the trial court or in the Supreme Court of the State of Wisconsin was any title, right, privilege or immunity claimed under the constitution or any treaty or statute or commission held or authority exercised by the United States denied the plaintiff in error, and no decision was made against such title, right, privilege or immunity in the proceedings had in the State Court in this case. The Supreme Court of the State of Wisconsin gave full effect to the rights of the plaintiff in error in the lands in question, both under the laws of the State of Wisconsin, and under the laws of the United States. See page 35 transcript of record, where the Court says:

"It is now pertinent to consider what interest the plaintiff had acquired in the lands at the time of the trespass. It has been held by this Court and by the Federal Supreme Court that an entryman secures no title to the land he desires to homestead until he has complied with the law and earned his patent.

Empey vs. Plugert, 64 Wis. 603, 607, 608, 25 N. W. 560;

Whitcomb vs. Provost, 102 Wis. 278, 282, 283, 78 N. W. 432;

Shiver vs. United States, 169, U. S. 491, 16 Sup. Ct. 54, 40 L. Ed. 231;

Stone vs. U. S. 167 U. S. 178, 17 Sup. Ct. 778, 42 L. Ed. 127.

If the homesteader, before he has earned and received a final receiver's receipt, cuts or removes any mor timber from his homestead than is necessary in the process of clearing his farm and fitting it for cultivation, he himself becomes a trespasser and liable to be prosecuted not only civilly, but criminally, for trespass.

Timber Cases (D. C.) 11 Fed. 81;

U. S. vs. Lane (C. C.) 19 Fed. 910;

U. S. vs. Freyberg (C. C.) 32 Fed. 195;

Shiver vs. U. S., supra.

Stover vs. U. S., supra.

No vested right is conferred on the claimant that may n
be taken away by Congress. Frisby vs. Whitney, 9 Wall. 1
19 L. Ed. 668; Yosemite Valley Case, 15 Wall. 77, 88, 21 L. E
82; Shiver vs. United States, supra. The homesteader on ma
ing his entry requires an inchoate right to secure the title
the land filed on, on complying with the homestead law,
preference to all other applicants for such land whose clai
are subsequent to his. The land thereby becomes segregat
and set apart for his benefit, and, in a sense, appropriated
his use.

Shiver vs. U. S., supra;

Burlington, etc. Ry. Co. vs. Johnson, 38 Kan. 142, 16 P
125, 129, and cases cited.

There was a right of action in some one to recover damag
for this trespass as soon as it was committed. It is clear th
such a right of action was vested in the United States as own
of the land. It also seems clear that under the facts of this ca
there was but a single cause of action, and that the plaint
had no title that carried the constructive possession so as
enable him to maintain the action. If there was but a sing
cause of action, that was extinguished by the settlement ma
with the only party who was entitled to make it.

The question of the actual possession as distinguished fr
the constructive possession of the plaintiff in error it seems
us is concluded by the findings of the trial court, which wo
conclusive upon the Supreme Court of the State of Wiscons
and in fact are in exact accordance with the undisputed e
dence in the case.

See 8th finding, page 23, transcript of record:

"That on February 10th, 1902, the plaintiff went upon t
land in question for the purpose of ascertaining the charact
of the soil and the timber thereon, intending, if the same we
satisfactory, to enter the same as a homestead. On March 20
1902, the plaintiff went upon the land in question to see if a
trespass had been committed thereon. That on April 5th, 190
the plaintiff again went upon the land in question temporari
and found the employees of the defendant, cutting the timb
thereon, and forbade them cutting any more of the timb

On July 1st, 1902, and within six months after the making of said homestead entry, the plaintiff established his actual residence in a house upon the lands and resided upon and cultivated the land continuously thereafter in accordance with the Laws of the United States, for a term of five years."

The trial court and the Supreme Court of the State of Wisconsin, found that the plaintiff in error was not in the actual possession of the lands, and upon this point the Supreme Court of the State of Wisconsin made its finding in the following language:

"That the plaintiff at the time of the cutting was not in the actual possession of the land from which the timber sued for was cut is too plain to admit of controversy.

Mygatt vs. Coe, 147 N. Y. 456, 42 N. W. 17;
Rice vs. Frayser, (C. C.) 24 Fed. 460;
Staton vs. Mullis, 92 N. C. 623;
Travers vs. McElvain, 181 Ill. 382, 387, 55 N. E. 135;
Webber vs. Clarke, 74 Cal. 11, 15, 15 Pac. 431;
Omaha & F. L. & T. Co. vs. Parker, 33 Neb. 775, 51 N. W. 139, 29 Am. St. Rep. 506;
Gildenhaus vs. Whiting, 39 Kan. 706, 713, 18 Pac. 916."

The only remaining question was whether or not the plaintiff in error had such title to the premises in question as would authorize him to maintain an action quare clasum upon the theory that he was in the constructive possession of the premises. The decision of the Supreme Court of the State of Wisconsin denies no right which the plaintiff in error had upon the undisputed facts in this case, but goes upon the theory that giving full force and effect to all the proceedings then taken by the plaintiff in error to acquire title to the lands in question, he had no such title as authorized him to maintain the action upon the theory that he was in the constructive possession of the premises. The Supreme Court of the State of Wisconsin says:

"There was a right of action in some one to recover damages for trespass as soon as it was committed. It is clear that

such a right of action was vested in United States as owner o the land. It also seems clear that under the facts of this cas there was but a single cause of action, and that the plaintif had no title that carried the constructive possession so as t enable him to maintain the action. If there was but a singl cause of action that was extinguished by the settlement mad with the only party who was entitled to make it." Transcrip of Record page 36.

The defendant in error submits that this question was question of local law, and involves no Federal question what ever. No right, privilege or immunity has been denied th plaintiff in error. The courts of the State of Wisconsin hav simply found that under the laws of that state the plaintiff i error, giving full force and effect to such rights as he had unde his homestead entry, was not in the constructive possession o the premises in question and therefore could not maintain th action. No federal statute was set up, or no claim made tha under the laws of the United States that the plaintiff in erro had any greater right to claim the constructive possession o the premises in question than he had under the laws of th State of Wisconsin. The writ of error here is in fact base upon the theory that the Supreme Court of the State of Wis consin erroneously determined as a matter of general and loca law that the plaintiff in error, giving full force and effect to hi title, was not in the constructive possession of the premises This certainly cannot be held to involve a federal question.

It is well established that the decision of a State Cour upon matters of general or local law cannot be reviewed by thi court. On a writ of error to a State court it was held:

"But the questions that come before this Court are con fined to the rights of the parties under the statutes of th United States, and when it is decided that Sylvester's deed wa valid under these statutes, its effect upon his later acts an acquisitions would seem to be a matter of local law."

Sylvester vs. Washington, 215 U. S. 80.

So in the instant case, the State Court having held the entry of the plaintiff in error valid, the question as to whether or not he could recover in the form of action chosen by him, for an alleged invasion of his admitted right, is a matter of local law.

The mere fact that parties claim adversely to each other under the mining laws, or under patents of the United States, does not entitle them to a writ of error from the Supreme Court unless there be a question made as to the meaning and construction of a federal statute, or of an authority exercised under the United States.

Avery vs. Popper, 179 U. S. 305; Blackburn vs. Portland Gold Mining Co., 175 U. S. 571.

Controversies in respect to titles derived under the mining laws of the United States may be legitimately determined in the State courts, and to enable the Supreme Court to review the judgment in such a case, it must appear not only that the application of a federal statute was involved, but that the controversy was determined by a construction put upon the statute adverse to the contention of one of the parties.

Gillis vs. Stinchfield, 159 U. S. 658.

Under section 2326 Revised Statutes for the trial of adverse claims to a mining patent, the right to review the judgment of a state court is to be limited to a proper case having been made clearly implying that some federal question should be involved, **and the minor controversy as to the right of possession will not make such a proper case, for otherwise every case arising under 2326 would be a proper case.**

Blackburn vs. Portland Gold Mining Co., 175 U. S. 571, reaffirmed in Empire, etc. Mining Co. vs. Bunker Hill Mining Co., 200 U. S. 613.

We submit that the question of whether or not the defendant in error removed timber from the lands of the plaintiff in error, for which the plaintiff in error was entitled to recover, is

just as much a question of local law as whether or not one miner has removed mineral from the claim of another miner, both claiming under patents from the United States.

We find no cause in our investigation covering the matter of the right to recover for trespass under circumstances such as are detailed in the findings of the Court in this case. The action as shown by the complaint was brought to enforce a right arising not under the laws of the United States, but under the laws of the State of Wisconsin for injury done by the defendant in error to the plaintiff in error. No denial whatever of the rights of the plaintiff in error under the laws of the United States has been made in any manner whatever. Full force and effect has been given to his entry and to the laws of the United States in respect thereto. The Supreme Court of the State of Wisconsin has simply found that no right of the plaintiff in error has been invaded. Therefore, we contend that upon this hearing this Court has no jurisdiction to reverse the judgment of the State court of the State of Wisconsin, and the judgment should therefore be affirmed.

Judgment Right Upon the Merits.

We have not reviewed the authorities cited by counsel for plaintiff in error upon this subject one by one, for the reason that they were practically all cited to and examined by the Supreme Court of the State of Wisconsin upon the argument in that Court. Many cases are cited which in our opinion have no application to this case. Manifestly there is a wide difference between the rights of a homesteader who has actually established his residence on the land and is in the actual possession thereof, and an entryman who has merely filed his entry in the local land office and has never established such residence. In this connection we desire to call the Court's attention to the entry made by the homesteader in this case, found in finding two of the trial court, page 20 of the transcript, on record:

"Land Office at Ashland, Wisconsin, February 20, 1802.
I, Glenn Knapp, West Superior, Douglas County, Wisconsin, do hereby apply to enter section 2289 Revised Statutes of the United States, the SE¼ of the NW¼, SE½ NE¼, NE¼, of SE¼ of section 3, in township 46, of range 9, containing 160 acres. GLENN KNAPP."

Accompanying this application he is required to make a homestead affidavit found in finding 4 of the trial court, transcript of record page 21, which among other things, contains the following:

"I, * * *, do solemnly swear * * . that my said application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons or corporation. That I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence and cultivation necessary to acquire title to the land applied for."

The plaintiff in error applied to enter, that is, to be granted the right to go upon the lands in question and acquire title thereto by settlement. He does not agree to enter. All that the government requires in that respect is an affidavit of good faith. In fact the history of the acquirement of public lands by settlement leads one irresistably to the conclusion that the government has always followed the policy of not entering into a contract with the entryman, probably for the purpose of enabling the government to recover its lands without resorting to foreclosure or some other process of forfeiture. The relation of an entryman to the government is not that of a purchaser to a vendor, nor that of a holder of an option with the owner, but is unique, and as stated by the Supreme Court of the State of Wisconsin, no vested right is conferred on the claimant that may not be taken away by Congress.

Frisby vs. Whitney, 9 Wallace 187.
Yosemite Valley case, 50 Wallace 77.

But because the land is appropriated and set apart by this

entry in a certain peculiar sense, it does not follow that it is appropriated and set apart to the entryman for all purposes and in every sense. We do not understand how the plaintiff in error can claim that the relation of the entryman to the government is analagous to a tenant for life, or a remainderman (See brief, page 18.) in face of the fact that this Court has held that the entryman has no vested right in the lands in question, see cases cited above.

It seems strange to one familiar with the practical administration of the land laws by the United States, that the government having for many years collected from hundreds of homesteaders and other persons who have committed trespass upon lands entered, that the claim should now be set up that the government has no right to collect for such trespass.

If the contention of the plaintiff in error is correct, then Knapp might have entered this land, settled with the defendant in error for this trespass, giving full acquittance therefor, and never thereafter have gone upon the land, or in any manner completed his entry, and the United States would have been deprived of all title to the timber cut and removed by the defendant, or any claim to damages therefor. As the Supreme Court of the State of Wisconsin points out, it is manifestly impossible that there can be two titles, each of which carries with it the constructive possession of the premises in question. When Knapp made the entry in question, the fee simple title was vested in the United States. The United States had never parted with that title and it remained in the United States until a vested right thereto had been acquired by the plaintiff in error under the laws of the United States, there was no claim that any such right existed at the time this trespass was committed.

We can add nothing further and refer to the opinion of the Supreme Court of the State of Wisconsin. The decision in this case not only has the weight of an argument, but of an

horitative statement of the laws of the State of Wisconsin, ding upon this Court as to all matters of general and local

We therefore respectfully submit that the judgment should affirmed.

A. L. KREUTZER,
C. B. BIRD,
M. B. ROSENBERRY,
J. J. OKONESKI,

Solicitors for defendant in error.

KNAPP *v.* ALEXANDER-EDGAR LUMBER COMPANY.

ERROR TO THE CIRCUIT COURT OF BAYFIELD COUNTY, STATE OF WISCONSIN.

No. 139. Submitted January 18, 1915.—Decided April 5, 1915.

An entryman's interest prior to actual possession is more than mere color of title. From the time of the entry the homesteader has the right of possession as against trespassers and all others except the United States.

The title of a homesteader, while inchoate, is subject to be defeated only by his failure to comply with the requirements of the statute, and so long as he complies therewith he has an inceptive title sufficient as against third parties to support suits in equity or at law.

A homesteader has a preferential right to the land, and when he receives a patent vesting in him the complete legal title it relates back to the date of the initiatory act so as to cut off intervening claimants.

Under special circumstances such as are present in this case, a homesteader may maintain an action for trespass against one cutting timber on the land entered and recover from the wrongdoer and retain for his own use the value of that which has been taken notwithstanding the trespasser has settled with the Government and paid an amount in satisfaction for the timber taken.

Although, until patent issues, the land entered is under the control of the Land Department, the power of that Department is not unlimited or arbitrary and cannot be exercised without notice to the homesteader and opportunity to be heard; and it is open to the homesteader to seek redress in the courts for wrong done to his interests by an unwarranted compromise.

In this case the facts do not show knowledge on the homesteader's part of the facts sufficient to charge him with ratification, and *quære* whether ratification can be inferred from a mere demand on his part without benefits accruing to him as the result thereof.

Quære as to the right of the trespasser against whom judgment is rendered in such a case to require from the homesteader an assignment of his claim against the Government for the amount collected by it in settlement of the trespass.

Judgment based on 145 Wisconsin, 528, reversed.

THE facts, which involve the rights of a homestead after entry and before patent as against trespassers, are stated in the opinion.

Mr. H. H. Grace, Mr. Geo. B. Hudnall and *Mr. C. R. Fridley* for plaintiff in error.

Mr. C. B. Bird, Mr. M. B. Rosenberry, Mr. A. L. Kreutzer and *Mr. J. J. Okoneski* for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

This action was brought in the Circuit Court of Bayfield County, Wisconsin, by plaintiff in error, to recover damages for timber cut and removed from his land and converted into lumber by defendant. The Circuit Court rendered judgment for plaintiff, but the Supreme Court of the State reversed this (145 Wisconsin, 528), and re-

manded the cause with directions to enter judgment in favor of defendant, and this having been done, the case comes here upon questions concerning the nature of an entryman's title under the homestead laws of the United States. Rev. Stat., U. S., §§ 2289, *et seq.*

The facts as found by the trial court, whose findings were adopted by the Supreme Court, are as follows: Prior to February 20, 1902, the land in question, being a tract of 160 acres situate in Bayfield County, Wisconsin, was public land subject to homestead entry under the laws of the United States. On the date mentioned, pursuant to § 2289 *et seq.*, plaintiff duly made application for a homestead entry of this land at the local land office, filed the proper affidavit, paid the Register and Receiver's fees, and obtained a certificate of the entry and a Receiver's receipt. On February 26 he made and filed the non-saline affidavit required by law. On April 5 he went upon the land temporarily, found employés of defendant cutting timber thereon, and forbade their cutting any more. On July 1, and within six months after the making of the entry, he established his actual residence in a house upon the land, and resided upon and cultivated the land continuously thereafter, in accordance with the laws of the United States, for a term of five years. On August 5, 1907, he made his final proof, and a Receiver's final receipt was issued to him. On January 22, 1908, he received a patent, and ever since then has been the owner of the land in fee. On and between March 20 and April 7, 1902, defendant by its agents entered upon the land and cut and removed therefrom, willfully, unlawfully, and without authority, 49,190 feet of pine timber. Thereafter a special agent of the United States investigated the trespass, and reported the amount thereof to the Secretary of the Interior, together with a proposition of settlement made by defendant after the trespass had been estimated, and accompanied by a certified check for $320.14. Upon the

basis of this report, which stated that the trespass was unintentional, the Secretary of the Interior in July, 1903, treating the amount offered as the measure of damages due to the Government under the ruling in *Wooden-Ware Co.* v. *United States*, 106 U. S. 432, accepted the proposition of settlement, and the money was deposited in the treasury of the United States as received "on account of depredations upon the public timber." There is nothing in the pleadings or findings to show that plaintiff was a party to this settlement, or had any notice of it, although his entry was then, and had been at the time the timber was cut, in full force. After he received his patent, he demanded said sum of $320.14 from the Government, but the demand was refused. In fact, the cutting of the 49,190 feet of pine timber from the land in question by defendant was not done by mistake, and defendant did not at or before the time of the service of its answer in the action serve upon plaintiff an affidavit that the cutting was done by mistake, or offer to submit to judgment in any sum, as provided by § 4269, Wisconsin Stats. 1898. The stumpage value of the timber was $5 per thousand; its highest market value before the trial and while in possession of defendant was $12 per thousand; and upon the latter basis the trial judge gave judgment in favor of the plaintiff for $714.87, which included interest from the date of the patent; the court holding that defendant's settlement with the Government was of no effect as against plaintiff.

Section 4269, Wisconsin Stats. 1898, provides: "In all actions to recover the possession or value of logs, timber or lumber wrongfully cut upon the land of the plaintiff or to recover damages for such trespass the highest market value of such logs, timber or lumber, in whatsoever place, shape or condition, manufactured or unmanufactured, the same shall have been, at any time before the trial, while in the possession of the trespasser or any purchaser from

him with notice, shall be found or awarded to the plaintiff, if he succeed, except as in this section provided." The other provisions here referred to cover cases where the cutting was done by mistake or under *bona fide* claim of title. In view of the findings, they have no bearing upon the present case.

The Supreme Court held that since at the time of the cutting the plaintiff was not in actual possession of the land, his right of action, as in trespass *quare clausum fregit*, must depend upon constructive possession, to be established by showing a good title; that notwithstanding plaintiff's homestead entry, there was, for timber cutting prior to the time of his actual entry into possession of the land, only a single right of action, and this was for the benefit of the United States as legal owner, to the exclusion of the entryman; and that, consequently, the settlement between defendant and the Government was a complete defense to plaintiff's action. The court seems to have regarded the entryman, prior to the taking of actual possession, as having no more than color of title, and, while recognizing that the equitable doctrine of relation is applicable also to proceedings at law, held that this had no effect as against the claim of the United States, and when this was satisfied all claim for damages by reason of the timber cutting became extinguished, and the issuance of a patent could not revive it.

Laying aside for the moment the effect of the settlement, it is, we think, erroneous to regard the entryman's interest prior to actual possession as being nothing more than a color of title. From the making of his entry the homesteader has the right of possession as against trespassers and all others except the United States; he has also an inchoate title, subject to be defeated only by failure on his part to comply with the requirements of the homestead law as to settlement and cultivation. So long as he complies with these laws in the course of earning a complete

right to the lands as against the Government he has a substantial inceptive title, sufficient as against third parties to support suits in equity or at law. *United States* v. *Buchanan*, 232 U. S. 72, 76, 77; *Gauthier* v. *Morrison*, 232 U. S. 452, 460–462; and cases cited.

The homesteader has a preferential right to the land, and in order to give effect to this according to the spirit of the laws it must be and is held that when he has fulfilled the conditions imposed upon him and receives a patent vesting in him the complete legal title, this title relates back to the date of the initiatory act, so as to cut off intervening claimants. *Shepley* v. *Cowan*, 91 U. S. 330, 337, 338; *Landes* v. *Brant*, 10 How. 348, 372; *Lessee of French* v. *Spencer*, 21 How. 228, 240; *Beard* v. *Federy*, 3 Wall. 478, 491; *Grisar* v. *McDowell*, 6 Wall. 363, 380; *Stark* v. *Starrs*, 6 Wall. 402, 418; *Lynch* v. *Bernal*, 9 Wall. 315, 325; *Gibson* v. *Chouteau*, 13 Wall. 92, 101; *United States* v. *Anderson*, 194 U. S. 394, 398; *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 334, 335. In *Gibson* v. *Chouteau*, 13 Wall. 92, 100, the court, by Mr. Justice Field, said: "By the doctrine of relation is meant that principle by which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceeding which consummates the conveyance is held for certain purposes to take effect by relation as of the day when the first proceeding was had." The present question was very fully considered by the Circuit Court of Appeals for the Eighth Circuit in *Peyton* v. *Desmond*, 129 Fed. Rep. 1, 11, 13. In that case timber was severed from the land after the initiation and during the maintenance of plaintiff's homestead claim, and an action brought after patent issued was sustained, the court saying: "It does not comport with the spirit of the homestead law to say that, after the initiation

and partial perfection of a homestead claim, some third person may rob the land of a substantial part of that which gives it value, and that, on full compliance with the law by the homestead claimant, the government may convey to him that which is left of the land, and may recover from the wrongdoer, and retain to its own use, the value of that which has been unlawfully taken from the land through no fault or wrongful act of the homestead claimant."

Is the case altered by the fact that after the trespass, and before plaintiff received the patent, defendant settled with the representatives of the Government and paid an amount agreed upon as a satisfaction of the Government's claim? In considering this question it is essential to bear in mind that the trespass was in fact willful, and not attributable to mistake; that at the time of the trespass defendant had constructive if not actual notice of plaintiff's homestead entry; that when it made the settlement with the Government over a year later, plaintiff was in possession of the land as a homestead settler and defendant had actual notice of his rights; that the compromise was made without notice to him, and was voluntarily made upon the basis of a report of a special agent to the effect that the trespass was unintentional, when defendant knew the fact to be otherwise; and that whether the trespass was unintentional or willful had a most material bearing upon the amount of damages recoverable, as well upon general principles (*Wooden-Ware Co.* v. *United States*, 106 U. S. 432) as under § 4269, Wisconsin Stat. What would have been the effect of a compromise made with the consent of plaintiff or after notice to him and an opportunity for a hearing, we do not need to say, for no such question is presented. But we think it follows from principles well established that defendant cannot set up the settlement made under the circumstances here disclosed and without notice to plaintiff, holder of an inceptive title to the land. Although until patent issues the homestead is under the

control of the Land Department, which may for sufficient reasons even cancel the entry, yet this power is not unlimited or arbitrary, nor can it be exercised without notice to the homesteader with opportunity for a hearing. *Cornelius* v. *Kessel*, 128 U. S. 456, 461; *Barden* v. *Northern Pacific R. R.*, 154 U. S. 288, 326; *Michigan Land Co.* v. *Rust*, 168 U. S. 589, 592; *Guaranty Savings Bank* v. *Bladow*, 176 U. S. 448, 453, 454; *Hawley* v. *Diller*, 178 U. S. 476, 489; *Thayer* v. *Spratt*, 189 U. S. 346, 351; *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 338. We think there is no difference in principle that will uphold as against the entryman a release or compromise by the Land Department, without notice to him, of a substantial right of action against a trespasser, to the benefits of which the entryman is entitled. Therefore, when the patent has issued and the jurisdiction of the officers of the Land Department is thus terminated, we think it is open to the homesteader to seek redress in the courts for wrongs done to his interest by such an unwarranted compromise, as for other legal errors committed in the course of administration. *Moore* v. *Robbins*, 96 U. S. 530, 533; *United States* v. *Schurz*, 102 U. S. 378, 396 *et seq.*; *Smelting Co.* v. *Kemp*, 104 U. S. 636, 640, 645; *Michigan Land Co.* v. *Rust*, 168 U. S. 589, 592; *Brown* v. *Hitchcock*, 173 U. S. 473, 478; *Guaranty Savings Bank* v. *Bladow*, 176 U. S. 448, 454. And where, as here, the departmental action complained of has substantially impaired the value of the homestead entry, and has been taken wholly without notice to the entryman, it constitutes no bar to judicial proceedings otherwise properly maintainable by him against the trespasser after receipt of his patent.

It is no answer to say that the legal right of action for a trespass to unoccupied lands resides in the owner of the legal title as being constructively in possession. Defendant did not pay the Government under compulsion of a suit or judgment in trespass, but, for reasons of its

own, voluntarily undertook to compromise the matter. In doing this, it could not properly rely upon restrictions peculiar to the action of trespass, but must take account of pertinent legal rights and obligations, however arising. Hence it was bound at its peril to recognize the beneficial nature of the homesteader's interest, at least to the extent of seeing that his rights were not cut off without notice. Defendant knew, when it made the compromise, or with proper inquiry would have known, that plaintiff was in possession under a homestead entry that antedated the trespass; that his patent, if and when issued, would relate back to the time of his entry; and that the officials of the Land Department could not lawfully take action substantially impairing the value of his entry, without notice to him and an opportunity to be heard. It results, in our opinion, that a voluntary compromise made with those officials without notice to the homesteader, and upon a basis that, as defendant knew, did not afford full legal compensation for the injury done, cannot be invoked by defendant to his detriment.

To the suggestion that plaintiff has ratified the compromise, because, after he received his patent, he unsuccessfully demanded from the Government the sum of $320.14, received by it in settlement from defendant, it is sufficient to say that it is not found that he did this with full knowledge of the facts. Whether ratification could be inferred from plaintiff's mere demand, without benefit accruing to him as the result of it, we do not stop to consider.

We therefore hold that the Supreme Court of Wisconsin erred in denying a recovery to plaintiff, whether because of the incomplete nature of his title and his want of possession at the time of the trespass, or because of the settlement afterwards made between the Government and defendant.

We are not called upon to consider whether plaintiff

could recover from the United States by a suit in the Court of Claims the amount received from defendant in the compromise (*United States* v. *Jones*, 131 U. S. 1; *United States* v. *Anderson*, 194 U. S. 394), because upon the facts as found plaintiff is entitled to recover a larger amount and upon a different basis of fact from that which controlled in the compromise; and defendant as the wrongdoer cannot put upon plaintiff the burden of prosecuting two actions to recover compensation for a single wrong. Our decision, however, is without prejudice to action by the Wisconsin courts requiring that plaintiff, upon obtaining judgment against defendant in accordance with the principles above declared, and as a condition to payment of that judgment by defendant, shall assign to defendant his claim against the Government, or, upon being properly indemnified, shall agree to permit defendant to use his name in proceedings to recover the money. We intend no intimation respecting the effect, if any, of § 3477, Rev. Stat., upon such an assignment.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.